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RIGHT OF REPRESENTATION UNDER THE MITAKSHARA—A Reply.

I propose to discuss in this article the question whether under the Mitakshara School of Hindu Law a grandson by a predeceased son is, in a case of inheritance proper, excluded by the surviving son of a deceased Hindu. This question has already received the attention of 'A Lawyer' who in an able contribution appearing in the VIth Volume of the "Madras Law Journal" examined the texts, and the case-law bearing upon the subject and landed at a conclusion in favour of the exclusion of the grandson by the surviving son. But as I apprehend that the conclusion so arrived at is not quite in keeping with the authorities bearing on the subject, I feel emboldened to express a note of dissent from "A Lawyer's" position and to lay before the reader my reasons for affirming the contrary.

In dealing with this question we have to ascertain—(1) the nature and the scope of the so-called doctrine of representation; (2) the nature of the interest, if any, which the son and the grandson have in the separate or self-acquired property of the father or the grandfather; and (3) the scope of the principle of inheritance that to the nearest sapinda the inheritance next belongs. We shall now proceed to consider these points in their order in view to a satisfactory solution of the question proposed.

The so-called doctrine of the right of representation is accepted, commented upon and illustrated by modern text-writers on Hindu Law, although ancient texts do not, so far as we are able to see, enunciate any principle which deserves to be called by this name. This right of representation is defined as the right which the male issue of a deceased co-parcener have to represent the right of their

ancestor to a partition and claim the share which he would have taken at a partition. (Mayne's Hindu Law, S. 432.) That this doctrine applies in all cases of partition of co-parcenary property is clearly laid down by all text-writers; but whether it applies to any cases of inheritance properly so called is a point upon which no text-writer is clear. Indeed Sarvadhikari says: "The son, the grandson and the great-grandson successively inherit the property of the deceased. The son excludes the son's son, and the grandson excludes the great-grandson. Sons share equally *per capita;* but those who, like grandsons, take *jure representationis* inherit *per stirpes, i.e.,* they take that share only which he whom they represent would have taken had he been alive. The right of representation is admitted as far as the great-grandson; so that a grandson whose father is dead, and a great-grandson whose father and grandfather are dead, participate equally in the inheritance with the son. But, during the lifetime of their parents, neither the grandson, nor the great-grandson, is entitled to the inheritance. They are excluded by their father and grandfather." (Sarvadhikari's Hindu Law Lectures, p. 881.) But this passage is very far from clear as the opening portion of it appears to lay down that the son excludes the grandson who in his turn excludes the great-grandson, while the concluding portion of it seems to lay down the simultaneous succession of the son, the grandson and the great-grandson to the property of a deceased Hindu. Supposing, however, that this passage clearly lays down such simultaneous succession, it might still be contended not without some degree of plausibility that the passage in question has reference to cases of succession under the Dayabhaga School of Law—an objection supported by the context in which this passage occurs. There is one point, however, upon which all text-writers are agreed, and that is, that this right of representation stops short with the great-grandson. The text upon which the doctrine of the so-called right of representation is based and supported is the latter hemistich of Sloka 120 of Chapter II, Yajnavalkya's Institutes, which, when rendered into English, reads thus: "Among grandsons by different fathers the allotment of shares is according to the fathers." (Col. Mit., Chap. I, S. V., para. 1.) To determine accurately whether any principle like that indicated by the expression 'right of representation' could by any effort be squeezed out of this text, it is necessary to

understand its context and the purpose which it is intended to serve. After establishing in a lengthy disquisition at the very commencement of his commentaries on Yajnavalkya that the son and the grandson acquire a right by birth in the property of the father and grandfather, the author of the Mitakshara says: "In respect of the right by birth to the estate, paternal or ancestral, we shall mention a distinction under a subsequent text." (Col. Mit., Chap. I., S. 1, para. 33.) The author then proceeds to comment upon Yajnavalkya's text regulating the time and the mode when and in which a partition of the father's property among his sons should be made. With the first hemistich of verse 120 of Yajnavalkya this is done and the author then introduces the second hemistich in the following way: "The distribution of the paternal estate among sons has been shown; the author next propounds a special rule concerning the division of the grandfather's effects among grandsons." (Col. Mit., Chap. I., S. V., para. 1.) It is thus clear that this second hemistich, the only foundation upon which the doctrine of the so-called right of representation is built by modern text-writers, could not possibly have been intended to confer upon the grandsons a right to partition which they could not have claimed but for this text. It was simply intended to point out the mode in which the property should be divided among grandsons in whom a right to partition was manifestly admitted to exist. This reasoning is quite obvious, and to make assurance doubly sure we need only refer to the opening words of Vijnaneswara's commentary on this text: "Although grandsons have by birth a right in the grandfather's estate, equally with sons, still the distribution of the grandfather's property must be adjusted through their fathers and not with reference to themselves." (Col. Mit., Chap. I, Sec. V., para. 2.) The view we have taken is further supported by the principle laid down by Vijnaneswara in the discussion introductory to his commentary on the Dayavibhaga chapter that partition is the consequence of a pre-existing right. Again, far from creating a right in the grandson, this text clearly operates in curtailment of the grandson's rights—an assertion easily proved by supposing that this text had been elided. On this supposition every grandson who by birth acquires an interest in the grandfather's property quite like a son would be entitled to an equal share with a son at a partition of the grandfather's property on the well-recognised

principle that equality is the rule where there is nothing laid down to the contrary. Thus where a Hindu dies leaving family property and a son and two grandsons by a son pre-deceased, the two grandsons would count for two and the surviving son for only one at a subsequent partition, and thus make the position of the surviving son worse than if their father had been alive at the date of partition. To avert this anomaly arising from the equal right by birth of the son and the grandson in the grandfather's property, Yajnavalkya lays down a special rule, that the grandsons by the same son, whatever be their number, shall together take only what their father would have taken, if alive, at the date of their grandfather's death.

Another patent circumstance shewing that nothing at all resembling the so-called doctrine of the right of representation was ntended to be laid down by the passage in question is this. At the end of the commentary on this passage, the author of the Mitakshara anticipates certain objections tenable only on the hypothesis that this passage conferred upon the grandsons a right of succeeding to the property of their grandfather under the conditions therein expressed and implied. The objections in general language amount to an assertion that the grandson could not claim a partition under conditions other than those laid down in this passage; and the author of the Mitakshara meets these objections in his commentary on the following verse, *i.e*: "The ownership of the father and the son is the same in land which was acquired by the grandfather or in a corrody or in chattels (which belong to him)." (Mit., Chap. I, S. 5, para. 3.) "In such property," says Vijnaneswara, "which was acquired by the paternal grandfather through acceptance of gifts or by conquest or other means as commerce, agriculture or service, the ownership of father and son is notorious : and therefore partition does take place. For, or because, the right is equal or, alike, therefore partition is not restricted to be made by the father's choice; nor has he a double share. Hence, also it is ordained by the preceding text that the allotment of shares shall be according to the fathers, although the right be equal." (Col. Mit., Ch. I., S. V, paras. 5 and 6.) It is thus clear that the author of the Mitakshara makes no attempt to bring the hypothetical cases within the language of the preceding text, but explains away the objections

formulated by the 'notorious' equality of the right of the father and the son in properties acquired by the grandfather. We have thus no doubt that there is nothing corresponding to the doctrine of this right of representation to be found in original texts and that there is no text at all from which this doctrine could by any process be evolved.

But conceding for the purposes of argument that such a doctrine is laid down, directly or indirectly, in the Hindu Law texts, it still remains for us to ascertain whether this right is either expressly or impliedly confined to cases of succession by survivorship or partition of co-parcenary property, or whether it applies even to cases of inheritance properly so called. Mr. Mayne's definition of this right is not, we apprehend, quite correct; for supposing that this doctrine were deducible from the passage in question, there is absolutely no warrant for restricting this doctrine to cases of partition of co-parcenary property alone. It is obviously erroneous to think, as Mr. Mayne seems to have thought, that the texts relate to partition only of a joint-tenancy; for there may be need of a partition even in cases of tenancy in common. It may be said that, from the particular context of this passage, its applicability only to cases of partition of joint-family property could be inferred. This may well be met by a categorical denial and may be refuted by showing how both Yajnavalkya and Vijnaneswara do not apparently draw any distinction between cases of succession by survivorship and cases of inheritance proper so far as the rights of the son, the grandson, and the great-grandson go; but as this course would require much space, and as we find an easier solution for this particular difficulty, we are content to follow the shorter course. Now we ask, if this doctrine of the right of representation deducible from the passage is confined strictly to cases of partition of co-parcenary property and has no manner of application in cases of inheritance proper, how is the allotment of shares among grandsons under similar circumstances to be regulated in a case of inheritance proper? If A, a Hindu, dies leaving separate or self-acquired property, both his sons having pre-deceased him and leaving him surviving, two grandsons by one of them and three by the other, how then are these five grandsons to inherit? Is the division of the inheritance among these five grandsons to be *per capita* or *per*

stirpes? Of course, it would be readily answered that the division would be *per stirpes*. But by what text would that answer be supported? Search all the Mitakshara for one and you will have to rest your answer upon this very text, which, it was contended, applies to cases of partition of co-parcenary property alone. It is faintly suggested that as there is no text regulating the division of property among grandsons by different fathers in a case of inheritance, the mode of division pointed out by this text should on analogy be resorted to in cases where grandsons by different fathers inherit property simultaneously. We are at this point tempted to ask whether on the same line of reasoning the principles regulating the simultaneous succession by survivorship of sons, grandsons and great-grandsons in respect of co-parcenary property may not be applied in their integrity to establish the simultaneous succession by inheritance of sons, grandsons and great-grandsons in respect of the separate or the self-acquired property of the Hindu, considering the fact that there are no special texts to be resorted to in the latter case. But we are sure to be informed that the right of the son, the grandson and the great-grandson *inter se* in cases of inheritance is regulated by a well-known and well-defined principle, and so we pass on to discuss the scope of that principle.

This principle is no other than that of propinquity expressed in the rule "to the nearest sapinda, the inheritance next belongs." (Manu, Ch. ix. 187.) In order to understand clearly the exact scope of this principle of inheritance, we must realize its context. The Dayabhāganirnaya begins with verse 104 of the ninth chapter. Manu discusses the question of the time and mode of partition of father's property among sons, firstly, born of the same mother, and, secondly, born of different mothers of the same or different castes. He then defines the twelve sorts of secondary sons and discusses their individual and relative rights to inherit their father's property. This takes him to the end of verse 184 of the chapter, and then he sets about 'to determine the order of heirs entitled to inherit the property of a deceased sonless Hindu.' He says, "Not the brothers, not the parents, but the sons take the wealth of the father. The father and the brothers also take the wealth of the sonless deceased. To three should libations of water be offered, to three is the offering of rice-balls ordained, the fourth is the giver of these, and the

fifth has no concern. To the nearest sapinda the inheritance next belongs, and in default of these to the sakulyas, or the preceptor, or the disciple." (Manu. Ch. ix, 185—7). It is here seen that the ruling principle of inheritance, *i.e.,* that the inheritance next belongs to the nearest sapinda is for the first time laid down by Manu to determine the order of heirs to the property of a deceased sonless Hindu; and as we are entitled to assign a motive for Manu's enunciating this doctrine at this point of the devolution of property, we feel warranted in concluding that this doctrine was not intended by Manu to apply in cases where sons, grandsons and great-grandsons take the property of the deceased as his heirs, and when we consider what a high standard of merit was usually assigned by the ancient text-writers to brevity, we cannot help thinking that this doctrine would have been enunciated in an earlier portion of the chapter, if it was intended to govern cases of inheritance by the male issue of the deceased. In this connection the opening words of the gloss of Kullukha Bhatta on verse 187 are significant. The commentator thus introduces this verse: "As this general principle will become superfluous, if it was intended to apply to the case of sons, etc, already referred to, this is said for the purpose of enabling the wife, etc., not already spoken of to inherit the property of the deceased." This makes it clear that, although this principle of inheritance could apparently be well applied in the case of the sons inheriting as heirs, such application would be superfluous as the rights of these as heirs have been already regulated by some well recognised principle. What that other principle is, is not far to seek. It is the principle, the fundamental principle of the Mitakshara School of Hindu Law, that the sons, the grandsons and the great-grandsons of a Hindu have a right by birth in his property, ancestral or separate, or self-acquired.

In a lengthy disquisition at the commencement of the portion of Vijnaneswara's institutes that relates to Dayavibhaga, the author of the Mitakshara examines the ancient texts bearing on the subject of right by birth and asserts, as the conclusion he arrives at, that the male issue acquire an interest by birth in the property of their progenitor. 'A Lawyer' concedes that the word 'Daya' is used by the author of the Mitakshara in an extended sense so as to include property liable to the incidents of co-parcenary and

separate and self-acquired property, the subject-matter of inheritance. It is thus clear that, according to the author of the Mitakshara the male issue of a Hindu acquire a right to his property irrespective of the character of that property. At the conclusion of the disquisition Vijnaneswara says, "In respect of the right by birth to the estate, paternal and ancestral, we shall mention a distinction under a subsequent text." (Col. Mit., Ch. I, Ss. 2 and 33). This text, it will be easily seen, is no other than verse 121 of Ch. II of Yajnavalkya. "For the ownership of father and son is the same in land which was acquired by the grandfather or in corrody or in chattels (which belong to him)." (Col. Mit., Ch. I, S. V, 3). About the end of the commentary on this verse the author of the Mitakshara thus sums up the result of the authorities examined on the subject. "Consequently the difference is this: although he have a right by birth in his father's and in his grandfather's property, still since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property: but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction." (Col. Mit., Ch. I., S. V, 10.) Vijnaneswara thus holds that the son acquires a right by birth even in the father's self-acquired property, and that the son and the grandson acquire equal rights by birth in the grandfather's self-acquired property; only, the son has no independent power over the self-acquired property of the father. Nor is Vijnaneswara alone in this assertion. The author of the Smriti Chandrika also holds that *svathanthryam* (independent power) is not always co-existent with *swamyam* (ownership), and that there can be ownership without independent power of disposition as in the case of the son in respect of the wealth of the father. This view is also supported by what Manu says, "Let the brothers assemble after the death of their father and mother and equally divide the paternal wealth; for so long as they live, these have no power over it." (Manu, Ch. IX, 104.) Here the ownership of the sons in the property of their father is not denied; but all the same they cannot enforce their rights, because they have no independent power. All these authorities show that, according to the ancient texts, the son and the grandson acquire a right by birth in the property of the father and the grandfather, whether ancestral

or self-acquired, and that in the case of self-acquired property the right could not be exercised owing to the superior rights of the acquirer himself in that he has both the ownership of such property and the independent power to dispose of it. The right by birth exists in both cases; but in the one case, *i.e.*, in the case of ancestral property, it could be asserted at the option of the owner of the right, whereas in the case of self-acquired property this right by birth which the son and the grandson have, cannot be asserted at their option, because the living acquirer has, as being the acquirer, a predominant interest.

On a consideration therefore of these facts, we believe that the doctrine that the inheritance next belongs to the nearest sapinda has no application to cases where a deceased Hindū leaves any male issue down to the fourth generation and that the sons, the grandsons and great-grandsons inherit the estate of the deceased by virtue of their right by birth in the property of the deceased.

Our opinion that the rights of the son, the grandson and the great-grandson as much in cases of inheritance proper as in the case of succession to joint family property are governed by the same principle is considerably strengthened by the fact that in none of the ancient texts that treat of property and its devolution, the subjects of partition and inheritance are separately discussed. Vijnaneswara treats of partition among sons and grandsons and without saying a word as to the relative rights of sons, grandsons and great-grandsons in cases of inheritance abruptly begins to determine the order of heirs entitled to inherit the property of a Hindu dying without sons. Manu, as we have already said, discusses the rights of sons, primary and secondary, in the property of their father and suddenly proceeds to determine the heirs to the property of a deceased sonless Hindu. So do the authors of the other Smritis deal with the subject of partition, and that done, proceed immediately to assert the right of the widow, the father or the mother of the sonless deceased as the case may be. We need not add that the word 'sons' used by these authors includes sons, grandsons and great-grandsons. The omission therefore on the part of these ancient lawgivers to treat the subjects of partition and inheritance separately and to formulate different principles regarding each is, in our view, a strong and clear indication that

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those writers consider partition and inheritance as regulated by the self-same principle. It is also noteworthy that those writers who have so much to say about the preferential right as heir of the widow, the mother or the father of the deceased, have not a word to say about the relative rights of the son, the grandson and the great-grandson, in cases of inheritance. This omission considering the large number of Smriti writers can be explained only on the hypothesis that they saw no reason to choose between the son, the grandson and the great-grandson as heirs of their deceased common ancestor. On an examination therefore of the texts, ancient and modern, bearing on the subjects of partition and inheritance, we have little hesitation in coming to the conclusion that the doctrine of the right of representation is foreign to the genius of the Hindu law as gatherable from the ancient texts and that its acceptance by modern writers on Hindu law is altogether unaccountable, that the doctrine of Manu that to the nearest sapinda the inheritance next belongs, applies to the heirs of a Hindu dying without male issue, and that so far as the son, the grandson and the great-grandson are concerned, their rights of inheritance are governed by the same principle as their rights of partition in co-parcenary property, and that as heirs, the son, the grandson and the great-grandson have equal rights. We now proceed to examine the case-law upon the subject.

The case-law as regards the point at issue is very meagre. There is to be found among reported cases only one case in which the point came up directly for decision. In *Luchomun Pershad* v. *Debee Pershad*, 1 W. R., 317, the grandson of a Hindu (governed by the Mitakshara Law) by a pre-deceased son was found entitled to share equally with the surviving son of his grandfather in the grandfather's self-acquired property. The authority of this decision is, however, questioned on the ground that the point raised was neither discussed nor considered fully. But the process of reasoning by which their Lordships arrive at the conclusion is clearly indicated in the judgment and shows that the arguments, *pro* and *con*, have been considered. Their Lordships observe that the Hindu Law texts enunciate no principle from which the son's preferential right over the grandsons to inherit the self-acquired property of the grandfather could be deduced or inferred, that the word '*putra*' or son included a man's lineal descendants to the fourth generation and

that therefore they could draw no distinction between the son, the grandson and the great-grandson as heirs. Indeed, the judgment is to some extent based upon the fact that counsel engaged to plead the cause of the son were not able to refer their Lordships to any texts accepted as authoritative under the Mitakshara School of Law in support of the son's preferential right, but there is no ground for supposing that counsel omitted or neglected to rely on authorities which could be availed of. Nor is there any reason afforded by the language of the judgment to lead us to think that their Lordships' judgment was in any measure influenced by the circumstance of the son or the grandson, or both of them having been living with the deceased grandfather on the date of his death. In answer to the contention raised on behalf of the son that the grandson had been virtually excluded from the inheritance during the lifetime of the grandfather, their Lordships found that the facts on the record did not go to substantiate that portion of the defence. Seeing that the property in suit was admittedly the self-acquired property of the grandfather, we fail to see the possibility of their Lordships being influenced in their judgment by their finding just above referred to. We next refer to the observations of Mr. Justice Muthusami Aiyar in *Muthuvaduga Natha Tevar* v. *Periyasami*, I. L. R., 16 M., 14. In the course of that judgment the learned Judge observes: "As for obstructed and unobstructed heritage (*Sapratibandha* and *Apratibandha*), the distinction is material only to the extent that in the one case the nearer male heir excludes the more remote, whilst in the other the doctrine of representation excludes this rule of preference . . . . Thus the rule that to the nearest sapinda the inheritance belongs applies alike whether the heritage is obstructed or unobstructed, with this difference, *viz.*, that when the last full owner leaves sons, grandsons and great-grandsons, their sapinda relationship confers equal spiritual benefit on him, though their blood relationship is not the same and that they are all co-heirs within the meaning of the rule. Hence it is that the text of Yajnavalkya, Mit., Ch. II, Sec. 1, verses 2 and 3, premises the death of a male owner without a male issue." These observations are certainly *obiter dicta*, but they have nevertheless their own value as those of an eminent Hindu Judge. The portion of the passage quoted on which we lay particular stress is the portion not quoted by 'A lawyer' in his article, *i.e.*, the

last sentence that shows that Yajnavalkya's text does not, so far as the Judge was able to understand it, contain any principle which would warrant our choosing between the son, the grandson and the great-grandson as heirs to an inheritance. We next go to the observations of Mr. Justice Telang in *Apaji Narhar* v. *Ramchandra Ravji*, I. L. R., 16 B., 29. In the course of his judgment the learned Judge observes:—"Even when the property is the self-acquired property of the grandfather, the grandson by birth acquires a right to it even while it is yet in the grandfather's hands; such right is doubtless liable to be defeated by the exercise of the dominant right of the grandfather as the acquirer, but not being so defeated by any act of the grandfather, it attaches upon his property in the same way as the right of the grandfather's sons themselves. It is not a right to receive a share of that which the father may receive on a partition; it is a right in and to the property itself, like that of the father, and co-equal with it." It must, of course, be conceded that these observations are alike *obiter dicta*; but proceeding as they do from that talented Judge, they are entitled to considerable weight. It is urged that these observations and the view taken by their Lordships in *Luchoman Pershad* v. *Debee Pershad*, 1 W. R., 317, have little or no value as they are inconsistent with the principle of the decision of their Lordships of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari*, I. L. R., 10 A., 286. In the course of that judgment their Lordships indeed observe:—"Property in the paternal or ancestral estate by birth under the Mitakshara is so connected with a right to partition that it does not exist where there is no right to it." On the strength of this passage 'A Lawyer' argues that it is impossible to conceive of the right by birth which the son and the grandson are alleged to acquire in the self-acquired property of the father and the grandfather. We are afraid that this passage has not been properly construed. To our thinking, the expression 'where there is no right to it' is synonymous with the expression 'where—from the nature of the estate it is not liable to partition.' The passage does not and cannot mean that the absence of a present right to partition of an estate argues an absence of vested interest in the estate; for, otherwise it would amount to laying down that the grandson whose father is living acquires no right by birth in the

ancestral estate in the hands of the grandfather, seeing that he has no present right to partition. It is also noticeable that subsequent to this decision vested rights have been recognised by courts to exist even in cases where there was no present right to partition. The next case to which we refer is *Ramappa Naickan* v. *Sithammal,* I. L. R., 2 M., 182. The competition in that case was between the divided son and the widow of the deceased Hindu. Their Lordships in upholding the preferential right of the divided son rested their judgment mainly upon the principle of Hindu Law that the male issue have an unobstructed right of inheritance. 'Male issue,' or for the matter of that even the word '*putra*' or son, includes the son, the grandson and the great-grandson, and if it were correct law that the son excludes the grandson by a pre-deceased son on the ground of being the nearer sapinda, we fail to see how the grandson's right of inheritance that could be obstructed by the existence of his paternal uncle could be said to be unobstructed. At page 183 their Lordships quote with approval a text of Baudhayana cited in West and Bühler, 2nd Edition, page 535, and itself based upon the texts of Sankha and Likhita to the effect that a son or other male descendant is consubstantial with his father or other ancestor. This text clearly shows that the son, the grandson and the great-grandson are equally near as sapindas to their deceased ancestor, thus showing that even on the doctrine that to the nearest sapinda the inheritance next belongs, the son cannot exclude the grandson from the inheritance.

A word more and we have done. 'A lawyer' contends that 'whatever doubt may possibly exist in regard to the succession to the self-acquired property of the grandfather, there can be very little doubt as to the succession to the property of a grandfather who in his lifetime became divided from his son and has died leaving his separate property and sons and grandsons by deceased sons.' We confess we do not understand the process of reasoning by which this assertion is supported. The only effect of a partition between the father and the son is in the language of their Lordships in *Ramappa Naickan* v. *Sithammal,* I. L. R., 2 M., 182, at p. 184. "To free so much of the estate as falls to the lot of his father from any *present* proprietary right on the part of the divided son." The son, therefore, takes the property of his father on his death just in the same way as he would take it

by survivorship, if there were no partition between himself and his father. Similarly, where the grandfather was divided from both his sons and died leaving property obtained at the division and one of his sons and a grandson by the pre-deceased son surviving him, the grandson and the surviving son would by virtue of their being alike the male issue of the deceased, inherit the property in the same way as they would succeed to it by survivorship, if he had died undivided from them.

On these grounds, therefore, we are constrained to differ from 'A Lawyer' and to hold that the surviving son and a grandson by a son pre-deceased would inherit equally the property of the grandfather, whether separate or self-acquired.

S. SITARAMA SASTRI.

DOCTRINE OF SURRENDER OF A WOMAN'S ESTATE TO THE NEXT PRESUMPTIVE REVERSIONER.

Under this heading, I propose to consider those cases where a widow or other female owner possessing a limited estate under Hindu Law proposes to surrender that estate at once absolutely (and during the life-time of the limited owner) to the next presumptive reversioner, so that the estate may become vested at once in the latter in such a way that the same will upon his death pass to his heirs without reference to the heirs of the male owner from whom the female heir took it.

Let us first see how the matter stands on principle before entering into a discussion of the authorities.

In the first place, it must be mentioned that the present question involves the renunciation of a vested right by a widow in favor of her husband's nearest heir for the time being and not the disclaimer by her at the time the succession opened (*i.e.*, the demise of the husband) of her right to call for the possession of the estate. In other words in the matter under consideration there is no question of disclaimer, but there is a relinquishment by the widow (or other limited owner) of her right in her husband's (or the last full owner's) estate after she had entered upon or accepted the inheritance and the estate had thus completely vested in her.

If she said that she did not want the inheritance at the time of the husband's death and before she had entered upon (or accepted) the inheritance, then clearly she could do that and her refusal will operate to accelerate the estate of the remoter heir (*i.e.*, the heir of the husband next to that of the widow). But she could do so only once. The election can only be exercised once and that, at the time of the husband's death.

In English Law the inheritance is regarded as being vested in the next heir, and when the latter disclaims, it is loosely regarded as being the renunciation of a vested right. Perhaps it is more correct to say that what is vested is only an inchoate right. That inchoate right becomes perfected (from the moment of the death of the last owner) when the heir does not expressly disaffirm the inheritance.

No doubt the heir is given an option to refuse. But when he refuses, the refusal has reference to the date of the death of the last owner and the then next heir takes from the last date. Still the inheritance is not in abeyance. For, when the immediate heir refuses, the inchoate right of the remoter heir becomes perfected and the inheritance is deemed to be vested in him from the moment of the last owner's death. When the remoter heir succeeds he takes as the then nearest heir of the deceased and not as heir of the nearer heir who has refused. So that virtually even in the English Law there is a marked difference between a disclaimer and a renunciation. *See* Phill., p. 2411, Code Napoleon, Arts. 775, 777 and 785.

To return directly to our subject, succession opens in all systems of jurisprudence only in two cases. *See* Code Napoleon, Art., 718 and Dhayabhaga, verses 1, 2 and 31.

(1) Natural death, which needs no separate mention.

(2) Civil death.

It is useless to waste our time by considering what civil death means in other systems of law. But under the Hindu Law civil death occurs when a person becomes an outcaste or enters the religious order. Civil death by becoming an outcaste or losing status has now lost much of its importance. An Act (XXI of 1850) of the Legislature has been passed removing any disability on

account of loss of caste or degradation. Entrance into religious order arises in three cases—

(a) Where a person has become a hermit.

(b) Do. has become an ascetic who gives up all worldly concerns and devotes himself to the meditation of God or *Brahman*.

(c) Do. is a *Brahmachari* or professes to be a perpetual religious student. *See* Mayne, para. 517 (3rd Edition) and Mitakshara, Ch. 2, Sec. 10, p. 3 (note).

Besides these two classes of cases where succession opens, there seems to be a class of cases which does not fall strictly under either of the above two heads, but yet may be said to come within the second of the cases above referred to. For *Narada* has said, (2 Col. Dig., p. 197.) "The father being degraded or become an anchorite, or *having resigned*, or, deceasing naturally, his sons may divide the estate." This may, no doubt, have reference to a joint family and to partition. But, under the Dayabhaga, sons have no right by birth, and moreover the verse occurs in a chapter which treats of succession. This is explained by *Jagannatha* thus: "Resignation annuls property, and it is ultimately the same with abdication; for the cessation of wish for worldly concerns, accompanied by a declaration in this form 'henceforward I will not act in worldly affairs' annuls the right of property; afterwards, when he again desires worldly concerns, still property is not revived."

In the case above referred to, the person, no doubt, expresses no desire for worldly concerns, but he need not take to devotion. It is a sort of *quasi* civil death. No doubt it implies no moral turpitude. But at the same time it does not convey any idea of that kind of spiritual superiority wherein the hermit by his undistracted devotion to *Brahman* arises far ahead of all materiality and feels himself in a position to discern *Brahman*. It has only a negative element, *viz.*, the absence of desire for all worldly concerns. But the positive element, *viz.*, the devotion to God is wanting, or is not to be found to the same extent.

Taking it that this verse refers to a case of succession, and that when the conditions mentioned therein are fulfilled, a case of suc-

cession arises, we have to see what those conditions are. The commentator says that resignation means abdication and annuls property. So that, when a person makes a declaration in this form, "henceforward, I will not act in worldly affairs," his title to property ceases and succession opens so as to let in the next heir, and the fact that the person again desires worldly concerns does not revive his title and does not divest the next heir of his vested right. Hence, therefore, if a person makes the declaration aforesaid without more, *i.e.*, without transferring it to another, then alone succession could open.

In this connection it may be useful to refer to the Roman Law. The renunciation of a right (renunciatio) in the true sense of the word is the legal act by which a person abandons a right acquired, but without transferring it to another. "What then is the effect of this renunciation ?" The author goes on to say : "In the case of a right not yet acquired, it is universally admitted that a unilateral declaration of volition, having a renunciation for its object, bound its author and was irrevocable." Then the author points out that there is a difference of opinion as regards the question "whether a right actually acquired could be abandoned without the concurrence of him who profited by the renunciation, or in other words, whether the volition of abandoning an acquired right, once declared, was obligatory upon him who had expressed it, or whether he could revoke it at his pleasure." Then he says, that the preferable opinion is that which considers that in the case of real rights the isolated declaration (or unilateral act) was sufficient to complete the renunciation. *See* Goudsmith, p. 141.

The effect of renunciation or abandonment by a full owner seems then to be in Roman Law to make the property so abandoned or renounced as *res nullius*, so that if any person other than the person renouncing becomes the next taker, the person who renounced cannot revoke his former declaration of will and cannot wish to have a desire again for the property and take the same back again from the next taker. But if nobody has taken it in the meantime, he can himself become the next taker and take back the property if he wishes to have a desire again for the property. Hence two conditions must concur : (1) a person capable of renouncing and having the full rights of ownership. (2) The withdrawal of that ownership by that per-

son with intent to give up all rights over it. Hence as will be shewn presently the right of the usufructuary cannot be so given up as to make it *res nullius*. *See* Sandars' Institutes of Justinian, pp. 116 & 116.

If then the above text of *Narada* is applicable to the law of succession, there seems to be a difference between the Roman and Hindu Law. For the text considers that it is a case where succession opens. The text itself does not occur in other books of authority in the various schools. But it must be observed, the injunction of the text and the meaning of the author should be strictly followed, and, unless there is in the person renouncing no desire for worldly concerns which he shows by giving up all interest in all his property, succession will not open. A partial renunciation will not do, for that shows there is the desire for worldly concerns, and the effect of such a partial renunciation is to make the property *res nullius* (*i.e.*, abandoned by the owner).

The true test then is whether the person gives up his desire for worldly concerns. If he does so, then, according to *Narada's* text, succession opens and the next heir takes. If he does not do so, but retains his rights over other property and wishes to renounce his rights as regards a portion, or if having a desire for worldly concerns, he renounces all his bundle of rights in order that he may be able to enjoy better other worldly desires which he prefers, then, there is merely, an abandonment, or sleeping over of rights. The effect of mere abandonment by a *full* owner is to make property so abandoned *res nullius*, while that of sleeping over or non-user is not necessarily to make the property *res nullius*. The effect of abandonment or non-user by a *limited* owner is different.

In this connection, it may be useful to refer to the Roman Law of usufruct. An usufruct is said to be extinguished in Roman Law in the following among other ways :—

(1) By non-user within the limited time.

(2) By surrendering to the owner; but a cession to a stranger has not this effect. The stranger though not the owner of the usufruct can exercise the rights of the usufructuary until the latter dies or loses the servitude.

(3) By merger or consolidation as where the ownership becomes vested in the usufructuary, in which case the latter becomes the full and absolute owner.

When a usufruct determines, it reverts to, and is reunited with the ownership, and he who before was but bare owner of the thing, begins to have full power over it.

When there has been non-user by the usufructuary, then the owner may be in possession in which case by usucapio (after a certain time) the burden is completely relieved; or a stranger may be in possession. In the latter case if the stranger is in possession for the limited time, the effect seems to be that the usufructuary is completely barred, but as no usufruct can be acquired by prescription, the stranger must give up possession to the owner who thereby gets full power over the property. Before the limited time, however, the usufructuary can recover from the stranger.

The effect of abandonment of the usufruct (which is more than non-user) seems also to be the same, *i.e.*, the usufruct reverts to, and is reunited with, the ownership. It must be noted here that both the usufructuary and the owner have vested rights (under the Roman Law) and cases 2 and 3 resemble the surrender and merger of lesser estate in the English Law of Property.

The ultimate effect in Roman Law of non-user and abandonment by a usufructuary is not to make the usufruct *res nullius*.

But in Hindu Law, non-user by a widow the nature of whose estate is quite different from that of usufructuary produces the following results:—

(*a*) Where a stranger gets possession of the property and is for more than 12 years, the reversioner cannot get possession immediately, though the effect of the limitation may be to bar the widow. The reversioner can only sue after the death of the widow and if he is the nearest heir to this last full owner, he will be entitled to succeed.

(*b*) Where the reversioner is in possession for 12 years, the widow may be barred, but if he dies before the widow, then his heir or whoever may be in possession must give up the estate to the then nearest reversioner who is the preferential heir to her husband.

It may be noted that the reversioner in the Hindu Law does not answer the description of bare owner in Roman Law of the thing which is the subject of usufruct. The reversioner has no vested interest.

In Roman Law, then, renunciation or abandonment by a full owner is to make the property *res nullius*, while it is otherwise in the case of an usufructuary. In the case of a mere non-user by a full owner. the property does not become *res nullius*, but if the prescribed time runs against him, the stranger in possession gets a complete title.

In the case of abandonment and that of non-user by the usufructuary for the prescribed time, the usufruct is extinguished and reverts back to the owner who then has full rights of enjoyment. Non-user for a shorter time has no effect.

In Hindu Law, the effect of abdication (or renunciation) by the widow, or by the full owner, is to open the succession under the authority of the *Narada's* text. In the case of mere abandonment (*i.e.*, of portions of property) by a full owner, the effect is to make the property *res nullius*. But if a limited owner as a widow abandon portions, it may be binding against the widow, but it does not affect the reversion. In the case of non-user by the full owner, the property does not become *res nullius*, but it may be acquired by prescription by anybody. In the case of non-user by a limited owner or a widow, the effect is the same, but only a limited interest can be acquired, and the reversion is not in any way affected.

Beyond this abdication cited in 2 Col. Dig., p. 197, there is, it is submitted, no case where succession can be said to open. If, therefore, the person not intending to renounce temporal concerns and to abdicate all his rights in his property so as to let in the next heir by act of law and in the manner indicated by it, wishes to relinquish his rights already vested in the property to the next heir (though it may be) by a pure act of his own and without reference to the law, he is simply transferring by a pure act *inter vivos* his rights, whatever they may be, in the property, and the transferee can take no more. The fact that the next heir is concerned, is merely *accidental* and cannot enlarge the rights which an ordinary person can have under such a transfer. He can only have such

rights as his transferor has, and can take only such interest as the transferor possesses. If the person to whom the rights are relinquished is a perfect stranger, no question can arise as to the character of the transaction. Hence the fact that the next heir was concerned in it could not affect the nature of the transaction and could not convert what was a pure case of transfer *inter vivos*, into one of succession.

It cannot be conceived how a case of succession can arise under the circumstances set out in the preceding paragraph. If there be a relinquishment by a person to his next heir, then it cannot be said that the latter takes by succession. For succession is one of two kinds—(1) Intestate, (2) Testamentary. See Act X of 1865, S. 2.

Intestate succession is a case where a person dies without making any disposition by will and appointing an heir. The law appoints the heir and says that the property shall devolve in such and such a manner. Here the person transfers his rights by an act of his own. It could not be said that he has made no disposition of his property during his lifetime.

Then could it be said that it was a case of testamentary disposition? The bare statement of it is a complete answer to the question. Testamentary succession is where a person dying leaves a will disposing of his property in the manner therein provided, (and a person who is civilly dead cannot dispose of property by will, for in theory he has none, and if he has any he cannot then be said to be civilly dead), so as to take effect only after death. Here then is a complete transfer, which takes effect at once and during the lifetime of the transferor.

If the above view be correct, then the fact that a female intervenes and that such female possesses only a limited estate cannot in any way affect the question. Where the widow wishes to relinquish her rights in the property in favor of her husband's heir, she merely transfers her interest in the property by a bare act of volition on her own part to the next reversioner, and the latter can only take such rights as the widow herself has. On his predeceasing the widow, his heirs may, so long as the widow lives, remain in possession of the estate, but if she dies, and if they are not the husband's heirs, they must give up the property to the

person who is the actual heir of the husband at the time of the widow's death. For the deceased reversioner (who would have been the next heir) was not in possession in *his own right*, (the property had not vested in him as the heir of the full owner), but only as transferee from the widow and could not, therefore, *transmit the estate* to his own heirs.

Then could it be said there was a confusion or merger of rights? For it may be said, the widow had transferred her rights to her husband's heir, and the latter being the next reversioner, the effect of the surrender of a limited estate to the person entitled to the reversion is to make it merge in the reversion. See Mitra on the Hindu widow, pp. 361 and 362 (and cases cited therein). We can only say that here is a confusion arising from ideas borrowed from English Law. It has been authoritatively laid down now that the widow's estate is not a life-estate, nor is the reversioner's interest a reversion as is understood in the English Law of Property. The husband's next heir had (before the relinquishment) no *vested* interest in the estate. He merely had a chance of succession, or a bare possibility. He could, therefore, not have transferred his rights (for he had none) to another so as to enable that other to keep the estate upon his (transferor's) death and when the succession falls in actually. See Phillimore, p. 89. The transferee under such a transfer could acquire no rights, for when the succession falls in, on the widow's death, the husband's heir at that time will succeed. See Transfer of Property Act, sec. 6, cl.

If then the transfer of the possibility of becoming the husband's heir will create no independent rights in the transferee and could convey none to him and is absolutely prohibited for the reason that there is no estate nor right to transfer, how, when the widow has transferred her rights to the reversioner, could her rights *in esse* (I am not here considering the cases when the reversioner is himself alive and can take as heir and he has previously transferred his rights to another which a Court of Equity in England construes as a binding agreement) could be *merged* in the bare possibility (not a right) of the husband's heir to succeed to the estate in the event of the reversioner surviving the widow? There can be no merger, for there are no higher rights which could be said to merge the lesser rights in them.

The only cases then in which the widow can during her natural life by any possibility accelerate the estate of the reversioner are the following :—

(A) A disclaimer by the widow.

(B) Civil death of the widow.

(C) *Quasi* civil death of the widow.

(D) Re-marriage of the widow.

The first three cases have already been dealt with. There is no difference in such cases between a widow and other ordinary persons.

The fourth and last case was treated in ancient Hindu Law as being a case of civil death. Now a special enactment has been made, see Act XV of 1856. We need not mention this any further.

We shall next consider the effect of the decisions having a bearing upon the matter.

The Allahabad High Court has consistently negatived the proposition that the widow and the next presumptive reversioner could by any act of their own open the succession to the last male owner so as to completely vest in the next presumptive heir an estate which the remoter reversioners who may happen to be actual heirs on the widow's death could not question. (1)

In *Ramphal Rai* v. *Tula Kuari*, I. L. R., 6 A., 116, at p. 119 and 120 the Full Bench after discussing the nature of the estate taken by the widow (or any female) and stating that it is not in the nature of a tenancy for life and that her right to alienate exists only for certain purposes recognized by the Hindu Law and that otherwise she has only a life-interest in the usufruct which she is competent to deal with, say, "she has no disposing power over it in any other sense; and, though she takes by inheritance, her right is of so peculiar and exceptional a kind that the ordinary course of succession may be said to be suspended during her life. . . . . . Apart from her capacity under the Hindu Law in certain contingencies to transfer the *corpus* of her husband's

(1) See *Ramphal Rai* v. *Tula Kuari*, I. L. R., 6 A., 116; *Madhan Mohan* v. *Puran Mull*, I. L. R., 6 A., 288; *Duli Singh* v. *Sundar Singh*, I. L. R., 14 A., 377.

estate, the only personal alienable interest with which she is competent to deal is what we have indicated above, and whether she elects to convey it to the nearest reversioner, or to a stranger, is a matter of indifference. . . It is difficult to understand how any distinction can be drawn between the rights of the nearer and more remote reversioners. They alike have an interest in expectancy, contingent on the death of the widow, the value of which as marketable commodities, if marketable at all, must turn upon their relative propinquity as heirs, but their legal worth is identical. The immediate presumptive reversioner, alike with other reversioners, has no vested interest in the succession, which, under the Hindu Law, being diverted during the widow's life into ordinary channels, only opens up on her death. And again they say, "We know of nothing in the Hindu Law to sanction the view, that a person possessed of limited rights, such as those of a Hindu widow, can, by uniting with one of many others having identical interest in expectancy on the happening of a certain event, anticipate that event and convert such individual expectancy into an immediate absolute estate of full proprietorship. If this were permissible, it would virtually confer upon a Hindu widow the right of diverting the succession to her husband's property in her lifetime when in law it only opens on her death. . . . . . If the nearest reversioner's consent alone is ineffectual to validate a transfer to a stranger, it seems to follow reasonably that it is equally insufficient to create an unimpeachable title in himself when he is the transferee (or perhaps to speak more accurately, the surrenderee). We think that the spirit of Hindu Law is to keep the right of succession to the deceased husband's estate open until the widow's death, free of any control by her, except in such cases as she has a power to adopt, and that no reversioner possesses such a present vested interest as enables him to combine with her in defeating his co-reversioners. In other words, his right and theirs have one common basis, that of survivorship to (*i.e.*, surviving) the widow, and it is incapable of anticipation."

The reasoning in effect accords with the view I have before expressed, and I would only wish the Court had gone a step further and elucidated the true principles upon which acceleration is possible and the circumstances under which it can take place.

The Calcutta High Court has taken an extreme view. They hold that not merely could the widow, by an act of her own, relinquish her interest in her husband's estate to the next reversioner so as to defeat the ultimate rights of the remoter reversioners, but that she could with the concurrence of the next reversioner alienate absolutely and without legal necessity and for a purpose of her own to any stranger or other person. For, the latter stand upon the express texts of Hindu Law upon a different footing and have never been upheld so as to bind the actual heir, unless legal necessity is shewn.

The cases where alienations with the concurrence of the next reversioner have been upheld to the prejudice of the remoter reversioners are *Mohunt Kishen* v. *Busgeet Roy*, 14 W. R., 379; *Raj Bullubh Sen Oomesh Chunder Rooz*, I. L. R., 5 C. 44; *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*, I. L. R., 10 C. 1102 (F. B. overruling decisions to the contrary in *Gopeenath Mookerjee* v. *Kally Doss Mullick*, I. L. R., 10 C. 225, and *Ram Chunder Poddar* v. *Hari Das Sen*, I. L. R., 9 C. 463). The cases in *Radha Shyam Sircar* v. *Joy Ram Senapati*, I. L. R., 17 C. 896 and 900 (note) also uphold the same principle; but as in those cases some only of the reversioners of the same grade joined, and the alienations were set aside.

Strictly speaking the fact of the concurrence on the part of the presumptive reversioner is only a matter of evidentiary value as respects the existence of an alleged legal necessity for the alienation. But there has been a long course of decisions in Calcutta which places the two on an equal footing.*

Turning now to the question whether an absolute title would vest in the next reversioner by reason of a gift or surrender of the estate by the widow, the earliest authority of note is to be found in the case of *Sremutty Jadamony Dab* v. *Saroda Prasad Mookerjee*, Bouln., p. 121, S. C. 2 N. L. C., pp. 627 to 634. The Court (*Jackson* and *Dwarkanath Mitter*, JJ.) held that the widow could legally surrender to the next reversioner her interest in her husband's estate

* *The Collector of Masulipatam* v. *Cavaly Venkata Narrainapah*, 8 M. I. A., 529; *Pestonjee Bezonjee* v. *Abdool Rahiman*, I. L. R., 5 B., 463.

so as to confer an absolute title in the reversioner. The reasoning seems to be that such an anticipation does not militate against the spirit of Hindu Law. *Jackson,* J., says that "the policy of Hindu Law is not to keep the estate as long as possible inalienable and subject to a species of entail unascertained but only to prevent the alienation of family property." But the learned Judge fails to note whether any method of transfer is known to Hindu Law which can have the effect of such anticipation by act of parties.(8)

In *Shama Soonduree* v. *Shurut Chunder Dutt,* 8 W. R., 500, the Court (*Jackson* and *Dwarkanath Mitter,* JJ.) upheld the surrender, and the decision is based upon the English notion of surrender of a life-estate in favor of the reversion. I have already observed upon this aspect of the point and pointed out the distinction which to my mind exists between a reversion in England, the so-called reversion of the last owner's estate when a female intervenes (in India).

In *Nofer Das Roy* v. *Modhu Soondari Barmonia,* 5 C.,L.R., 551, Sc. 5 C., 732, the Court followed *Shama Soonduree* v. *Shurut Chunder Dutt,* 8 W. R., 500, and *Gunga Pershad Kur* v. *Shumboonath,* 22 W. R., 393, but *Jackson,* J., at p. 553, gave an additional reason, *viz.,* that such a surrender to the next heir is a meritorious act in Hindu Law. I can see no authority for such a view. On the contrary, the Hindu text-writers positively say that on the widow's death the estate of the husband should go to the then next heirs. on the Hindu Widow—*vide* Mitra, p. 395.

In *Gopee Nath Mookerjee* v. *Kally Doss Mullick,* 10 C. 1102, the principle of the so-called surrender and the rights of the next reversioner to whom the widow relinquishes, are considered, although the case itself is one of alienation. *Garth,* C. J., says at p. 1108, that "what is usually called a surrender of a widow's estate is more properly a relinquishment in favor of her husband's heirs. If she died a natural death, those heirs would succeed. If she were to become a byragi, or otherwise suffer a civil death, the *result would be the same;* and as I take it to be clear that when her husband dies, she might if she had so pleased have *disclaimed* the estate, there

(8) *Protab Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Chowdhrain,* 1 W. R., 98; *Gunja Pershad Kur* v. *Shumbhoonath Burmun,* 22 W. R., 393; *Raj Bullubh Sen* v. *Oomesh Chunder Rooz.,* I. L. R., 5 C. 44.

would seem nothing *wrong* or *objectionable* to her relinquishing her husband's estate to her husband's heir after she had once accepted it." There may be nothing wrong or objectionable in relinquishing or alienating the widow's own life-interest, but the question is, is it not wrong or objectionable to uphold it to the extent of defeating the rights of the remoter heirs who turn out to be the actual heirs at the time of the widow's death? The learned Judge is cautious enough not to say that there would be a case of succession as in the two other previous instances he mentions. Obviously there can be no case of succession, and the relinquishment to her husband's heir is purely a voluntary act *inter vivos* of the widow who can give no higher rights than what she herself has (by her own act). The fact that the widow and the next heir are the parties concerned, could not alter the nature of the transaction.

The learned Judge then considers the policy of the law and points out how the rights of the ulterior heir who turns out to be the actual heir at the time of the widow's death would be defeated by recognising such a transaction. This policy the learned Judge considers might influence him if the question were *res integra,* but he would follow the law, as the current of authority in that Court was strongly in favor of that view.

This apprehension of the learned Chief Justice found justification in *Hem Chunder Sanyal* v. *Saranamoyi Debi,* I. L. R., 22 C., 354. In this case, the widow transferred the whole estate to the next heir by which act the parties supposed the title of the reversioner complete, and the reversioner would be justified in dealing with it as he pleased. He, thereupon, transferred half of the estate to the widow absolutely. Thus the transaction amounted to a division of the estate into equal moieties between the widow and the reversioner. Even the Calcutta High Court found it difficult to support the validity of such a transaction. They held that the widow had only a life-estate in respect of half the estate which had been reconveyed to her by the reversioner, but that as respects the half-share taken by the reversioner, he had taken an *absolute estate.* The learned Judges say that two propositions appear to them to be well-established :—" First, the widow may relinquish the whole of her interest in her husband's estate, and then the next reversioner will acquire the estate absolutely. Second, the

widow may convey to the next reversioner, or to a third party with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest."

As authority for the first, no doubt 19 C., 236, is referred to; but as the 1st proposition laid down above is a simple case of relinquishment without more (and not to the next reversioner), I think the learned Judges refer to the case of a disclaimer or abdication. Their Lordships go on to say: "The second proposition, though amply supported by the authority of decided cases (*Gopee Nath Mookerjee* v. *Kelly Doss Mullick*, 10 C., 1102, &c.), is not, it must be owned, reconcileable in its broad generality with the strict principle of Hindu Law, as laid down by the general authorities. According to that principle, the reversioner, after a Hindu widow, is the person who is the nearest heir to her deceased husband at the date of her death. And if by death we understand *civil death* or relinquishment of wordly interests as well as *natural death*, the first of the above two propositions will not conflict with the foregoing principle. But before the event which is to determine the actual reversioner, *viz.*, the cessation of the widow's estate by death or *relinquishment*, happens, no contingent reversioner can say that the estate will vest in him; and it is not easy to understand on what principle the widow, by making an alienation (not in the nature of a relinquishment of her estate) either in favor of the next presumptive reversioner or in favor of a third party with the consent of such presumptive reversioner, can affect the rights of the actual reversioner when the succession opens to him."

This is a clear recognition that the doctrine of the so-called surrender by a widow is not based upon Hindu Law and upon right principle, but that the course of decisions in Calcutta being in favor of upholding such a doctrine, the Judges in this case were constrained to uphold it.

In *Behari Lal*, v. *Madho Lal*, I. L. R., 19 C., 239, and 19 I. A., p. 30, the widow executed an instrument of management in favor of her daughter's son. Subsequently another daughter's son was born who claimed his share of the estate. It was contended for the reversioner who was a party to the instrument that it created an absolute title in his favor, and that, therefore, he took an absolute estate, and that the plaintiff having been subsequently born he

had no right to claim a share. The Privy Council upon the construction of the document held that it conferred only a power of management during the widow's life-time, but did not operate as a relinquishment. This finding therefore was sufficient to dispose of the case. But it contains an *obiter dictum*, which it has been contended in later cases, has the effect of recognising the principle enunciated by the Calcutta High Court, *viz.*, that the relinquishment in favor of the next heir operates as a surrender and enures to give him an absolute title. It is important to consider what the *obiter dictum* is and what its effect. At page 32, their Lordships observe: "It *may be accepted* that according to Hindu Law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate is a practical check upon the frequency of such conveyances." It must be noted that the respondent's counsel was not called upon and the counsel for the appellant only cited (as appears from the argument) a Calcutta Case, *Noferdoss Roy* v. *Modhu Soondhari*, I. L. R., 5 C., 732. Under these circumstances it can scarcely be said that their Lordships' attention was drawn to the several cases and that they then considered the point and laid down the *obiter dictum* (for the guidance of the courts). Their Lordships simply say that it *may* be accepted (for the purposes of disposing of the case before them). Hence it is submitted that this *dictum* ought not to be regarded as having settled the law and that the matter is still open for discussion. It may also be remarked that the observations seem to suggest that the reliquishment of the widow in favor of the reversioner if permissible at all should comprise the whole estate of her husband so as to amount to a destruction or withdrawal of the life-estate.

I have not been able to find any authority in point in Bombay. It may, however, be observed that widows and wives (widows) of *gotraja sapindas* only have a limited interest and that, only over immoveables. Daughters, &c., take an absolute estate in Bombay, and generally all females have an absolute power of disposition *inter vivos* over moveables, inherited from the husband (or other male owner).

The state of authority in Madras is as meagre as it is in Bombay. In *Natha Varadia* v. *Venkatasubbia*, 2 M. L. J., 130, the *mortgage* by a mother with the consent of the then nearest reversioner was upheld, and the Court (*Collins*, C.J., and *Wilkinson*, J.) held that a person born subsequently cannot question the same. This is opposed to *Duli Singh* v. *Sundar Singh*, I. L. R., 14 A., 377. The Madras decision is based upon the assumption that if the plaintiff was born, his rights could not be prejudiced. This way of looking into the matter is, it is submitted, wrong. The fact that the person questioning was born subsequently should make no difference. It must be noted that in all such transactions, if the presumptive heir, in whose favor the transaction is entered into, dies before the inheritance falls in, the interest of the ulterior heir is always prejudiced, if it should be held that the transaction binds him. The time of birth is immaterial. It can never be said that when the transaction was entered into, there was no remote reversioner in existence, for the State will always be such remote reversioner in absence of preferable remote reversioners, among the relatives of the deceased. The ulterior reversion is ever present, though there may be change in the *person* by the birth of preferential heirs. Hence, it can never be asserted at any time that the transaction entered into with the presumptive heir could not injure the ulterior reversion on the ground that none represent the ulterior reversion at the time of the transaction, for the State will always represent it.

In *Raghava Mudaliar* v. *M. Narayanasami Mudaliar*, 4 M. L. J., 88, the facts were as follow :—Patchayappa owned (ancestral) property and died leaving two sons, Thoppai and Virabhadra. Thoppai was insane and Virabhadra enjoyed and died some years after. Patchaippa's widow, (Unnamalai) then entered into possession of the property on 8th February 1882, she executed a will with the consent of the next reversioner Vydinatha, whereby she gave the properties to plaintiff. Plaintiff brought this suit to eject the defendant alleging him to be a trespasser. The argument was confined to the validity of an alienation by will by a widow with the consent of the next reversioner (though there seemed to be some concession for the purposes of the argument that the law might be otherwise if there was a conveyance *inter vivos*). The learned Judges (*Collins*, C. J., and *Shephard*, J.) held that *Behari*

Lal v. *Madho Lal*, I. L. R. 19 C., 238, applied to the case, and that plaintiff required no title and dismissed plaintiff's suit.

In *Kolandaya Sholagan* v. *Vedamuthu Sholagan*, I. L. R., 19 M., 337, the widow had made two alienations with the consent of the next reversioner, one a sale and the other a mortgage. The sale and mortgage were found to be unreal and colourable transactions. Upon this finding of course, there remained no further question for discussion, as there was no transaction which was intended to operate. The Court (*Subrahmania Iyer* and *Benson*, J.J.) however referred to the Privy Council case above mentioned. They seem to treat the case of a sale and a mortgage on a different footing, while effect was given to neither. In treating about the mortgage they say that "even if the transaction were really a mortgage, the widow would be interested as the holder of the equity of redemption," and that her "life-estate not being at an end," the principle would not apply. If such be their meaning, the decision is in apparent conflict with that in *Natha Varadia* v. *Venkatasubbiah*, 2 M. L. J., 136. The Judges seem to be disinclined to accept in the *dictum* of the Privy Council as setting down the law. The question is still *res integra*.

Upon a full consideration of the authorities bearing on this matter the only consistent view is that the Hindu Law recognises no such thing as a surrender of the life-estate of the widow (or other limited owner) to the next reversioner and that the same is opposed to principle; and if the question were to arise again in the Madras High Court, it is hoped that the matter will be considered in all its true aspects and an authoritative decision pronounced.

P. R. GANAPATHI AIYAR.

TRANSLATION FROM VAIDYANATHA DIKSHITHIYAM.

The step-mother should be regarded as mother.

In the matter of marriage, the relatives in the line of the step-mother to five degrees should be excluded. Although in the case of the step-mother the *sapinda* relationship of connection by particles of the same body does not exist, the existence of

sapinda relationship is in her case established by an extended application of that term. (1) *Sumantu* says: 'All the wives of the father are mothers; their brothers, maternal uncles; the daughters of these, the daughters of maternal uncles; their sisters, mother's sisters; the daughters of these, mother's sister's daughters; their daughters, sisters; and the issue of these, the issue of the sisters; therefore they should not be married. Otherwise (if married) they would be making unlawful intermarriages. (2) The *sapinda* relationship (of the step-mother) is also spoken of in the *Srutis* and the *Smritis* as follows: 'She becomes one with the husband in *pinda*, *gotra* and pollution.' As the husband and the wife are *sapindas*, because of their making together but one body, sons, etc., through the connection by particles of the body of their father become *sapindas* with their step-mother and her *sapindas*. Therefore alone in the texts [*'Māthrithah Pithrithasthathā.'* *'Māthribandhubhyah Panchamam Māthripakshachcha'*] and other texts, the general word *'Māthā'* (mother) is used, not the word *'Janani'* (one who brings forth). Therefore the persons related as *bandhus* in the line of the step-mother should be excluded as those in the line of the mother. (3) Another *Smriti* says: 'A man should exclude his brother's wife's sister and her daughter and his father's wife's sister and her daughter.' *Commentary*—As the general term *'pithri'* is here used, persons within seven degrees in the line of the father, other than the natural father should also be excluded. (4) *Gautama* also says thus: 'Marriage should be between persons not of the same *Pravara* and removed by more than seven degrees in the father's line and in the line of the owner of the seed.' *Commentary*—A son begotten upon another's wife by *Niyoga* becomes the son of both. *Yajnavalkya* says that a son begotten by a sonless man upon another's wife by *Niyoga* becomes the heir of, and the giver of the funeral cake to both, according to law. Another *Smriti* also says that he becomes the *Dvyāmushyayana* of the owner of the seed and the owner of the soil. Similarly, in the case of the adopted sons, etc., both the *gotras* should be excluded because of their *Dvyamushyayana* character. 'The adopted son will not have the *gotra* or the property of the natural father, but he whose *upanayana* has been performed in the natural father's *gotra* becomes after adoption a man of two *gotras*. He whose *gotra* is not known takes the *gotra* of the man who performs his *upanayana*; but he

whose *gotra* is known becomes, like the adopted son, a man of two *gotras*. (5) The son adopted, the son bought, the son made, the son of the appointed daughter and the son born of the *Ārshā* form of marriage become *Dvyamushyāyanās* having two *gotras*. Therefore they should marry beyond five and seven degrees in both. This has been settled in *Vijnaneswara's*, *Varadaraja's* and others' works. The author of the Chandrika and others hold the other view. (6) *Markandeya* says: 'One should exclude in marriage as his own mother, a mother who is not his *sapinda*, one whom he has been calling his mother and a sister who is not his *sapinda*.' *Vasishtá* says: 'One should always exclude as his own mother, a woman whom he has been calling his sister or his mother and also a mother who is not a *sapinda*.' *Jābāli* says: 'The father, the grandfather and the great-grandfather, these three should be understood as connected by the funeral cake. The three from the grandfather's grandfather upwards are connected by *lepa* or the wipings of the hand. The propositus is the seventh. This is the relation extending to seven degrees, spoken of by the sages.' *Commentary*—Such being the case, as the maternal uncle's son, etc, do not come in for a share in the same *pinda* or cake, they are not *sapindas* and therefore their marriage is certainly sanctioned. The many texts which declare that some consider girls within five degrees on the mother's side and even girls of the mother's *gotra* ineligible for marriage, etc., apply to the case of the appointed daughter and to the issue of women married in the *Āsura* and other forms; otherwise a married woman can have no other *gotra* than that of her husband. Nor could it be said that the married woman retains the *gotra* to which she once belonged. As she could not retain her own *gotra*, she takes the *gotra* of her husband. It is said, 'a woman at the seventh step of the marriage loses her *gotra*. She becomes one with her husband in *pinda*, *gotra* and pollution.' (7) *Lokākshi* says that the son of the appointed daughter is of his mother's *gotra*. 'The son of the appointed daughter should perform the funeral obsequies of his mother, the oblations of food, water, etc, according to his maternal grandfather's *gotra*'; so said *Prjāpathy*. In the matter of the *Āsura* and other forms of marriage, *Markandeya* says: 'Where a girl has been married in the *Brahma* and other forms, her obsequies, such as the offerings of rice balls, libations, etc., should

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be performed according to her husband's *gōtra*; and if married in the *Asura* and other forms, according to the *gotra* of the father.' *Commentary* :—The meaning is 'according to the mother's father's *gotra*.' The result is that as in the case of the appointed daughter and in *Asura* and other forms of marriage there is no gift with water and the mother's *sapinda* relationship with the father and her continuance in the same *gotra* do not terminate, she continues to be the *sapinda* of her father, etc. Therefore the texts 'she who is not the *sapinda* of his father and of the same *gotra* with his mother, etc., must be understood as having reference to the case of the appointed daughter, etc. It might be asked why there should be anything said about the mother at all, seeing that the son being the *sapinda* of the mother becomes necessarily the *sapinda* of his mother's *sapindas*; we answer thus: When the son of the appointed daughter is abandoned by his maternal grandfather, then the *sapinda* relationship with him terminates. It may become possible for him to marry a girl who is the *sapinda* of his maternal grandfather. In order that it might not be done, the word 'mother' is here used. Similarly, as an adopted son loses his father's *gotra* by the very fact of his having been given away, a marriage with a girl of the *gotra* of his natural father may become possible. To show that it should not be done the word *pitha* is here used. The marriage of the son of a woman whose *sapinda* relationship has been terminated by her being married in the *Brahma* and other forms with the maternal uncle's daughters, etc., though within five and seven degrees is lawful. All the texts prohibiting marriage with the maternal uncle's daughter, etc., refer to the case of the son of a woman married in the *Āsura* and other forms and also of the son of the appointed daughter. The texts in favour of the marriage of the maternal uncle's daughter, etc., refer to the case of the son of a woman married in the *Brāhma* and other forms. This is the law.

On the marriage of maternal uncle's daughter.

(1) On this point *Narada* says: 'In some countries they narrow the scope of *sapinda* relationship and marry girls in the third degree on the mother's side and in the fifth from the father. A man in the fourth degree may marry a woman in the fourth or even in the fifth degree. But one in the fifth should not marry a

girl either in the fifth or sixth degree. One in the third degree may marry a girl in the fourth, or even in the fifth degree. (2) According to *Shadtrimshanmata*, one may marry, according to *Manu, Parāsara, Angiras* and *Yama*, a girl in the third degree from the mother or in the third degree from the father. (3) According to *Chathurvimshatimata*, one may marry according to *Manu, Parāsara Angiras* and *Yama*, a girl in the third or in the fourth degree either from the mother or from the father. (4) The *Smritisāra* says: 'In some countries they narrow the scope of *sapinda* relationship and marry the daughters of the maternal uncle and the daughters of the father's sister; a man in the fourth degree may marry a girl in the fifth and one in the sixth may marry a girl in the fifth. A man in the fifth may marry a girl in the fourth but not in the fifth; the *Smriti* which says that a man in the fifth degree should not marry a girl in the fifth is a prohibition where the relationship is traced through the father and not where it is traced through the mother. (5) The *Smritiratna* says: 'Eating meals with persons who have not been invested with the sacred thread and wives, and marrying maternal uncle's daughters being approved by men of good behaviour are considered as not censurable among the people of the South. Sea-voyage, eating flesh, military service and drinking wine are according to law not considered censurable among the people of the North. (6) *Brihaspati* says: 'The daughters of maternal uncles are married by men of the regenerate classes in the South. Men in the Central Provinces are mechanics, artisans, cow-eaters and fish-eaters. The women in the East delight in incontinence. In the North, women drink wine and could be touched by men during menstruation, and men marry childless widows of their brothers. The customary observances peculiar to every country, caste and family have been well declared. They are accordingly to be respected, for otherwise there will be disturbance among the subjects. Among the people of the South are now observed the marriage of the maternal uncle's daughter vitiated by the relationship through the mother, and the marriage, much condemned, of the brother's widow. In other countries the marriage of a girl within the family is observed. These customs though condemnable should not be checked when grown. The marriage of the brother's widow is also found among the Parsis. Some are against feeding in subsequent *sraddhas*, those Brahmins who have taken meals at a *Sradh* on the eleventh day.

None of these customary observances is against the Sastras, being peculiar to countries, castes, etc. Therefore a king ought to study Sastras and set about regulating the conduct of his subjects. *Commentary*:—As the mother married in the *Brāhma* and other forms does not retain her '*sapinda*' relationship (in her father's line), the daughter of the maternal uncle may be married. So also the father's sister's daughter. Nor could it be asked why on this view the mother's sister and her daughter could not be married; for, although there is no conflict with the Sastras, they are against the practice of the world. What is censured by the whole world, though lawful, should not be done. (7) *Manu* also says 'One should not do what is censured by the world though lawful.' (8) *Varahamihira* also says: 'The custom of the country must first be considered and that alone which is the established custom in particular countries should be done. The wise abandon whatever is condemned by the world. The astrologer must, therefore, tread the path honoured by the world.' *Commentary*:—Among the Southerns in the Telegu country, even men old in the study of the three Vedas, acting agreeably to the purport of the Vedas and well-behaved, follow the practice of marrying maternal uncle's daughters. Men equally learned and well-behaved in the Dravida countries marry girls in the fourth degree on the mother's side, etc. But in all countries the marriage of the mother's sister, her daughter, etc., is avoided. (9) *Manu* thus speaks of the obligatory force of custom. 'The practice of the well-behaved, the *Smrutis*, the Vedas, this is the threefold test of virtue. Whatever is done by good and virtuous men of the regenerate classes must be presumed to be lawful in the particular countries, families and castes.' (10) *Apastamba* says: 'They alone in whose family certain customs have been followed in succession by their ancestors will not be vitiated by following such customs; not so with others.' (11) *Devala* says 'Whatever custom has been lawfully established in a country should be observed in that country alone; for *Bhrigu* says that it is the custom of the country. Whoever are considered gods, whoever are considered regenerate classes, whatever is considered sacred water, whatever is considered sacred earth, whatever is considered purity, whatever is considered virtuous conduct, these should not be disregarded in those countries where they are so considered; for such is the law there. Whatever is enjoined as lawful in any country,

town, village or place of Vedic learning should not be disturbed.' (12) *Bandhayana* says: 'There are five deviations from law in the South and five in the North. We shall now speak of the five in the South. They are :—eating with one whose *Upanayana* has not been performed, eating along with women, eating of stale food and marrying the maternal uncle's daughter and the father's sister's daughter. The five in the North are :—dealing in wool, drinking of wine, dealing in animals having teeth in both the sides, wearing of swords and sea-voyage. By doing any of these in the other country where it is not permitted, the man becomes blameworthy. Every custom is obligatory in its own place.' *Commentary*—The South is the country between the Narmada on the north and Cape Comorin on the south. The North is the country between the Himalayas on the north and the Vindhya mountains on the south. The discrepancy between the well-behaved people of these two countries is fivefold. The word '*gamana*' means 'marriage.' The word '*urna*' means 'wool and things like carpets made of wool.' 'Having teeth on both the sides,' such as horses, etc. The word '*vyavahara*' means 'sale etc.' The word '*ayudhīyaka*' means 'wearing of swords.' The word '*samudrayāna*' means 'going over to other countries by boats.' One doing any of these acts as eating with one whose *Upanayana* has not been performed in the other country, *i.e.*, the North becomes blameworthy. So also one selling wool, etc., in the other country, *i.e.*, the South, becomes blameworthy. Each custom is obligatory in the particular country where it prevails. This is the clear construction of the text. Therefore, it is clear what should be done and what should not be done. However, *Bandhayana* subsequently adds: '*Gautama* says that this is false and that neither should be followed, because both are seen to conflict with *Srutis* we know.' *Commentary*—This is not to contradict what has been already said; for *Gautama* is mentioned (as holding this view). The Chandrika in commenting on this text says, that this is intended to show *Gautama's* approval of the marriage of *sapindas* of the mother. (13) There is also the text of *Apastamba*, which says, that where conduct is regulated by mere desire, there can be no law. He who follows that course goes to hell. *Commentary* :—This text also must be understood as referring to the marriage of mother's *sapindas*, such as the maternal uncle's daughter, etc. (14) There is also the text of *Vasishtha* which says, that customs obtaining in particular coun-

tries and particular times are obligatory, if not inconsistent with *Srutis*. This text is also in favour of our view, as there is here no conflict with *Srutis*. We hear of a *Sruti* favourable to our view. "Āyāhīndra pathibhirīlithebhir yajnamimam no bhāgadheyam jushaswa. Thripthām juhur mathulasyēva yōsha bhāgasthē puithrishwasēyi vapāmiva." *Commentary* :—Come Indra, '*Pathibhih*' means 'by ways,' '*Alithebhih*' means 'worthy,' come Indra to this our sacrifice by worthy ways and having come, taste of the share given you by us. For that purpose only have those engaged in the sacrifice reserved for you the "omentum well fried in ghee." Then follow the examples : "As the maternal uncle's daughter is the share of the daughter's son and as the father's sister's daughter could be married by the son's son." The meaning of the *mantra* is that similarly the omentum is the share of Indra. Thus the marriage of the maternal uncle's daughter is held legal by *Devanabhattopadhyaya,* the author of the *Smriti Chandrika,* on the ground that it is established by *Srutis, Smritis* and custom and also by other intelligent men who follow the customs of their countries. Here ends the discussion about the marriage of the maternal uncle's daughter.

Now the families to be avoided in the matter of marriage.

(1). On this point *Manu* says, 'In the matter of marriage let a man avoid the following ten families, though they be great and rich in kine, goat, sheep, gold and grain—the family which has omitted to perform the prescribed rituals, which has produced no male children, where the Vedas have not been studied, whose members have thick hair on their bodies and which have been subject to hemorrhoids, phthisis, dyspepsia, epilepsy, leprosy and elephantiasis." *Commentary*—The word '*hīna kriya*' means 'which has omitted to perform rituals enjoined by the *Srutis* and the *Smritis* ;' '*nishpurusha*' means 'having no male issue.' (This family ought to be avoided for fear that subsequently too no male issue may be born). '*Nischandah,*' means 'not studying the Vedas.' *Romasam*" means 'having much hair.' (This family must be avoided as too much hair is of the nature of *Nirruti;* for the Sruti says: 'Deformed and hairy body is produced only by *Nirruti,* for that is *Nirruti's* body.') The word '*arsasa*' means 'having piles.' The

word '*kshayi*' means 'subject to phthisis.' '*Amayavi*' means 'dropsy etc.' (That this family should be avoided is but proper, for fear of being tainted with dropsy, etc.) (2) *Yajnavalkya* also says: 'The girl must be chosen from high families of *Srotriyas* celebrated to the extent of ten degrees; but not even from such families where they are subject to contagious diseases.' *Commentary*:—*pūrusha* is the same thing as *purusha*. 'Famous to ten degrees' means 'famous to five degrees on the mother's side and five on the father's.' The family so celebrated is a high family, possessing sons, grandsons, cows, servants, villages, etc. It is said that from such a family the girl should be chosen. The exception is that even from such families, if they are subject to contagious diseases, such as leprosy, epilepsy, etc., no girl should be chosen. This is the drift. (3) *Yama* says: 'The following families are to be declared ineligible in the matter of marriage. The family of Brahmins and *Ritviks*, whose *Pravara* is not known, should be avoided. Families whose members have more or less than usual limbs, those which are subject to dropsy, so also those subject to elephantiasis should be avoided. Families whose members are always lustful, those whose members have thick hair, those which are subject to white leprosy should also be avoided. Families too high, families too low, families that come under no class of caste should also be avoided.' *Commentary*:—The word '*Anarsheya*' means 'whose *Pravara* is not known.' (4) *Manu* says: 'He who would raise the status of his family should always connect himself with higher and higher families and discard lower and lower ones. Those born in high families are always pure by virtue of their rituals, versed in *Srutis* and *Smritis* and leading a life of undisturbed *Brahmacharyam*. Connection with high families is possible only for the high. A man should connect himself with those who are always cheerful, kind to good men, good-natured, impartial, not irascible and easily pleased. One must studiously avoid connecting himself with persons who are addicted to stealing or calumniating, are impotent, atheistic in their tendencies, living by foul occupations, deformed in their persons, indulging in obstinate enmity with men of valour, guilty of treason, miserly or despicable. One must also studiously avoid families whose members are either barren, or prolific of female issue and where the ruler is the husband as also another. The issue inherit the tendencies of the father or of the mother or of both; and one

whose origin is bad will never get the better of his bad nature. (5) *Harita* says: 'The son takes after the maternal uncle and the daughter after the parents, and as the mother has been in her character, so will the son be.' (6) *Vishnu* says: 'A horse should be judged by its father, a girl by her mother, the soil by the grass, and the family by its observances.' Thus the families to be avoided in marriage have been mentioned.

The marriage of girls not of the same caste.

(1). Manu thus permits in special cases the marriage of girls of different castes indirectly prohibited by the injunction that one should marry in his own caste. 'For the first marriage of men among the regenerate castes, a girl of the same caste is most eligible; but for such as are impelled by lust, women in the direct order of the castes are to be preferred. A *Sudra* woman can be the wife of a Sudra; she and a *Vaishya*, of a *Vaishya*; these two and a *Kshatriya*, of a *Kshatriya*; these three and a *Brahmanee*, of a Brahmin.' *Commentary*—Women of the same caste alone should be married. Subsequently, if impelled by desire of sexual enjoyment, women of different castes may in their order be married. Thus it is clear that a Brahmin could marry four wives; a *Kshatriya*, three; a *Vaishya*, two; and a Sudra, only one and of his own caste. Now to show that a Brahmin or a *Kshatriya* may marry from a different caste where one of his own caste could not first be married, but that under no circumstances he could first marry a Sudra, the same author adds; 'A woman of the Sudra caste is not mentioned in any Sastras as the first wife of a Brahmin or a *Kshatriya* though in the greatest difficulties (to find a girl of their own caste).' *Commentary*—The word '*Vritta*' means 'virtue' and '*Anta*' means 'determination,' hence the word '*Vrittanta*' means 'code of virtue or shastra.' This means that a Sudra woman is never enjoined as a wife, but that she is allowed for purposes of sexual enjoyment. The same author thus describes the blame attaching to one who marries a Sudra woman as his first wife. 'Men of the twice-born classes, who, through ignorance, marry women of the servile class, soon degrade the status of their family and of their issue to that of the Sudras.' The same author also says that marrying a Sudra woman and begetting children on her are sinful in a Brahmin. 'A Brahmin who raises a Sudra woman

to his bed sinks into the lower regions, and if he beget a son upon her, loses his Brahmin caste. As his sacrifices to the Gods and to the Manes and his hospitality to strangers mainly require her co-operation, the Gods and the Manes disdain them and he never attains heaven.' After setting out fully the views of others on the subject, the same author thus concludes in favour of his own view. "According to *Atri* and the son of *Uthathya*, he who marries a Sudra woman is instantly degraded; according to *Sounaka*, on the birth of a son; and according to *Bhrigu*, on the birth of a son's son." *Commentary*:—'*Sudravedi*' means 'one who takes a Sudra woman to wife.' The son of *Uthathya* is *Gautama*. *Saunaka's* view is that the man is degraded only by begetting a son upon a Sudra woman, not by merely cohabiting with her. The intention seems to be that a Brahmin who has married a Sudra woman may not cohabit with her for fear that he may beget a son upon her. *Bhrigu's* view is that he is degraded on the birth of a son's son. As the Code of Manu is delivered through *Bhrigu* as his mouth-piece these texts have been commented upon as texts from *Manu*. (2) *Yajnavalkya* says; 'Three, two, and one are respectively enjoined as wives in the order of the castes for Brahmins, *Kshatriyas* and *Vaishyas*. The Sudra can only have a Sudra wife. It is said that the regenerate classes may marry a wife from the Sudra caste. But that is not my view as the husband is born again from his wife.' The Chandrika says that this means the same thing as the text of Manu. (3) *Paitinasi* says: 'Where a Brahmin girl is not available, girls of the other caste may be married. (4) *Jatukarni* says: 'If a (Brahmin) girl is not available let one (a Brahmin) lead the life of a *Bhikshu*, or let him beget sons upon a *Kshatriya* woman or on a *Vaisya* woman.' (5) *Narada* says: 'For a Brahmin, only three wives in the natural order of caste are allowed. A Sudra woman can be married by any one of the other castes in the inverse order. A *Kshatriya* could marry two wives from different castes and a *Vaisya*, one. A *Vaisya* woman could be married by husbands in two other castes than her own, and a *Kshatriya* woman in only one.' (6) *Vishnu* says: 'A Sudra wife of a man of the regenerate castes is useless for acquiring virtue. It has been said that she will be useful for purposes of sexual enjoyment in the case of the love-blind man.' (7) *Vasishtha* says: 'Some without *mantra* marry a Sudra woman. That should not be done; for by such sins the family will certainly

be degraded and shut out from heaven.' (8) *Manu* says: 'For one who has been kissed by a Sudra woman or winnowed by her breath, or who is born of her, there is no expiation prescribed. By following the pursuits of an artisan, by dealing with Sudra children, by dealing in cows, horses and carriages, by agriculture, by service under kings, by performing sacrifices which ought not to be performed, and by atheistic conduct, high families become degraded owing to the absence of *mantra*. *Commentary.*—This marriage between persons of different castes has reference to other Yugas, because it is prohibited in the Kali Yuga by the text, 'As also the marriage by the regenerate castes, of girls of different castes from their own.' Here ends the dissertation on marriage between persons of different castes.

NOTES OF INDIAN CASES.

Pakiam Pillai v. Innasi Fernand, I. L. R., 19 M., 458. The withdrawal of an application for probate cannot operate as a bar to the applicant propounding the same will as a caveator unless there be any statutory provision to that effect. The procedure of the Code is only made applicable in contentious cases under the Succession Act. Whether the special statutory bar contained in S. 373 is a rule of procedure within the meaning of the words of the Succession Act may be open to question. But assuming that it is, before the proceedings became contentious, the application for probate is withdrawn; and therefore, the procedure is not necessarily applicable. There is no case of *res judicata* as there was no decision and the learned Judge seems properly to hold that the caveator was not barred.

Kariadan Pokkar *v.* Kayat Beeran Kutti, I. L. R., 19 M., 461. The question in this case is one of some difficulty. The provision for maintenance under S. 488 of the Criminal Procedure Code was, as it has been pointed out by the High Court, enacted to check vagrancy. The question, therefore, as to what the law of marriage applicable to the parties is, does not arise. If a person is the father of illegitimate children, the point for consideration will be, assuming that he has sufficient means, does he neglect or refuse to maintain the children. The children should be unable to maintain themselves to entitle the Magistrate to make an order for an allowance. The inability to maintain itself in the case of a child will depend upon its age or physical infirmity. Can the putative father be said to neglect or to refuse to maintain a child

where by the civil law of the country, the duty is cast upon other persons to maintain it ?

Where the child is as a matter of fact receiving such maintenance from those, who by law are bound to maintain it, there is no question of neglect or refusal. Unless the section is regarded as merely providing a summary remedy, where, by the civil law, there is a duty to provide maintenance, we should be disposed to agree with the learned Judges in thinking that a right or correlative duty is created by the section; the result of which is, that, where, as a matter of fact, the child is not maintained by those bound by law to do so, the putative father must be said to neglect or refuse to maintain. Although the word "neglect" in the section might suggest the breach of a duty, the word "*refuse*" cannot indicate anything of the kind. We are, therefore, disposed to think that even where a child is not maintained by those bound to maintain it, the putative father may be made liable.

We think, however, the question of custody of a child, or as to who makes the application on behalf of the child has no place in the determination of the right to receive maintenance. It appears to us that the learned Judges have mixed up questions arising under the civil law in determining a case arising under S. 488, which makes no reference to the propriety or otherwise of a custody. See Weir, 1104 & *Lal Das* v. *Nekanjo Bhaishiani*, I. L. R., 4 C., 374.

Chinna Ramanuja Aiyangar v. **Padmanabha Pillayan,** I. L. R., 19 M., 471. There are two points of importance decided in this case. Is a payment by a debtor to one of two joint creditors a valid discharge. Their Lordships do not answer this general question but hold that where there was an agreement between joint creditors that one of them shall receive it and the debtor had notice, payment by him to the other cannot be a valid discharge of the debt. As regards the other question, there was hardly any difficulty but for the judgment of *Farran* J. in *Sowdamini Dasi* v. *Broughton*, I. L. R., 16 B., 574. We see no objection to several partners being made liable upon a bond executed by one of them or upon a lease or a mortgage.

Rustam Singh *v.* **Moti Singh,** I. L. R., 18 A, 474. We are disposed to doubt the correctness of this decision. Where a daughter has inherited property from her father, it does not appear to us that the expenses of her daughter's marriage are a proper charge upon the estate. The learned Judges cited no authority for the position that they are, and we think, the daughter's daughter being a person who can possibly have no claim upon the property of her maternal grandfather, cannot have

marriage expenses defrayed out of the estate. The maintenance of the daughter who inherited the estate would alone seem to be justifiable necessity for dealing with the estate.

Rahim Ali Khan v. Phul Chand, I. L. R., 18 A, 481. We are glad that the Full Bench of the Allahabad High Court has decided that where an application is made more than twelve years from the date of the decree, to take some step in furtherance of the application for execution presented under S. 235, it is not barred by the provision contained in S. 230. Where an execution petition is pending or where attachment subsists it will be monstrous to hold that a further application to sell the property though presented after the twelve years specified in S. 230, is barred by the provision contained in that section.

Abbubakur Saheb v. Mohidin Saheb, I. L. R., 20 M., 10. *Shephard & Subrahmania Aiyar*, J.J., hold that the judgment-debtor is not entitled to have a sale set aside merely on the ground of fraud of the decree-holder and they suggest that the auction-purchaser should be a party to the fraud.

We hesitate to accept this as sound law. There is no provision in the Code dealing with the setting aside of sales on the ground of fraud. But, upon general principles it has been held, that in execution proceedings the sale is liable to be set aside on the ground of fraud. It is not a question between the decree-holder and the judgment-debtor, nor does it appear to us to be of consequence that the fraud is discovered after the confirmation of the sale. The validity of the execution proceedings vitiated by fraud is a question between parties to the decree and the fact that the interests of the auction-purchaser would be affected by the result of the decision cannot make his complicity a condition precedent to the setting aside of the sale. In a recent case, the Privy Council held that a question between parties should be adjudicated upon under S. 244, even though the auction-purchaser's position be affected.

Pattibhiramayya Naidu v. Ramayya Naidu, I. L. R, 20 M., 23. Article 99 of the Limitation Act appears to be rather curiously worded. It only applies to the case of a person suing for contribution who has paid the whole amount of the decree and not merely something in excess of his share. But the time against him begins to run under the Article when the advance exceeds the share. The Article would appear to require amendment. There is no doubt, however, that the learned Judges are right in holding that the Article, as it stands, does not apply to a case where the whole amount is not paid, but Article 61 would apply.

Queen-Empress v. Krishtappa, I. L. R., 20 M., 31. This case raises a question of some nicety. A witness summoned to appear before a public functionary failed to attend at the space specified. The officer himself was absent. S. 164 speaks of a mere intentional omission to attend. There is no doubt in this case that the omission was intentional. But mere intention alone on his part is not punishable. His attendance before the public officer was impossible as the officer was absent. He had no knowledge of the absence of the officer and though there was intentional omission on his part, the learned Judges seem to us, to rightly hold, that the attendance before the officer should have been possible but for the witness's wilful abstention, and that he was therefore not liable under S. 174.

SUMMARY OF RECENT CASES.

Bills of exchange—Duty of acceptor in looking to the form of the bill.

Scholfield v. Earl of Londesborough [1896, A. C., p. 514.]

The law does not impose on every person who accepts a bill of exchange with a view to its circulation the duty of taking reasonable precautions, in order to prevent the possibility of any forgery being committed in it. Persons are not to be supposed to commit forgery, and the protection against such a crime is the law of the land, not the vigilance of the parties in excluding all possibility of committing it.

S drew a bill for 500£ with a stamp of a much larger amount than was necessary and with spaces left and presented it for acceptance to the defendant who accepted it in the usual course of business and handed it over to S, the drawer. S afterwards filled up the blanks left in the bill and fraudulently converted it into a bill for 3,500£ and negotiated it. The plaintiff became a *bonâ fide* holder for value of this bill and sued the acceptor on the bill as it stood, *i.e.*, for 3,500£. The acceptor paid 500£ in Court and pleaded that he was not liable for the rest.

Held: affirming the decision of the Court of Appeal that the defendant was under no duty of precaution to the plaintiff, and was guilty of no negligence, and was consequently entitled to judgment. *Young* v. *Grote* (4 Bing., 253) commented on and the actual decision in the case approved.

Duties of Executors and Trustees—Investments.

In re **Chapman, Cocks** *v.* **Chapman** [1896, II Ch. D., 763, C. A.]

There is no rule of law which compels a Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to adopt in the interest of all parties. Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment. Any loss sustained by the trust estate under such circumstances must be borne by the owners of the property, *i.e., cestuis que trust*, and cannot be thrown by them on the trustees, who have done no wrong, though the result may prove that they possibly might have done better. To render the trustees liable in such a case, wilful default, including want of ordinary prudence, must be proved.

The duty of executors is simply to call in the testator's unsecured debts, and to convert into money so much of his personal estate as is necessary to enable them to pay his funeral and testamentary expenses and his debts and pecuniary legacies. No doubt, speaking generally, it is the duty of executors to get in debts due to the testator; but it is no part of the duty of executors as such to realize mortgage securities of their testator not wanted for the abovementioned purposes.

Res judicata—Estoppel.

In re **Lart Wilkinson** *v.* **Blades** [1896, II Ch., 788, *Chitty, J.*].

A testator had by his will given two life estates in two trust funds to his two daughters under exactly similar circumstances, One of the daughters having died without issue a question arose as to what was to become of the capital of the fund of which she was tenant for life. The Court put a particular construction on the will and held that the corpus of the fund passed to the then surviving children of the testator. Neither the other daughter, nor her husband, was a party to these proceedings, but both of them were fully aware of the suit and its nature and the judgment in it and with full knowledge of the circumstances deliberately took the benefit of the order. In the division of the particular fund then in question both of them received a large sum under the construction put upon the will by the Court. The other daughter subsequently died, and her husband then sued to have a different interpretation put upon the will with regard to the fund of which his

wife was possessed as a life-tenant and the succession to the corpus which became a matter of dispute after her death.

Held: that, although the previous judgment could not bind the plaintiff in this suit, still he was estopped by his conduct after the judgment and under the judgment, and was not entitled to re-open the same question as was formerly decided though the question may arise with respect to a different fund in the same will.

An order appointing some one to represent a class, such as next of kin, is not binding on one of the next of kin who has a distinct and independent interest in another capacity.

Procedure Lexfori—Administration of Assets.

In **Doetsch. Matheson** *v.* **Ludwig** [1896, II Ch. D., 836, *per*: *Romer, J.*]

Some creditors of a firm carrying on business in Spain brought an action in England, on behalf of the firm's creditors, against the executors of a member of the firm (who had died in England leaving property there) claiming that his estate, after payment of his separate debts, was liable for the firm's debts, and asking for administration on that footing. The defence raised was that under Spanish law the creditors of a firm had first to exhaust the assets of the firm before they could have recourse to the estates of the individual members.

Held: that, according to English Law a creditor of a partnership of which one member is dead, is entitled as a creditor to share in the administration of the estate of that deceased partner after the separate debts are paid, without first proving that the surviving partner is insolvent, and without being obliged first to have recourse to the joint assets and that this is a mere matter of procedure;

that the proper order and priority of distribution of assets is always a matter for the lexfori, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution; and

that consequently that the defence raised was bad.

Practice—Procedure.

In re **Nobbs, Nobbs** *v.* **Law Reversionary Interest Society** [1896, II Ch. D., 830, *per*: *Kekewich.*]

In the Indian Code of Civil Procedure there is no provision apparently, to enable parties to a deed to apply to the Court by an originat-

ing summons for the determination of any question of construction arising under the deed without asking for anything further. Order LIV, r. 1, under the Judicature Acts runs as follows:—In any division of the High Court, any person claiming to be interested in any deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the Instrument and for a declaration of the rights of the persons interested. In this case the mortgagor of a reversionary interest applied under this order for the determination of the question whether according to the true construction of the mortgage deed, he was entitled to redeem, during the period fixed by the deed for the continuance of the loan. *Kekewich*, J, held that the Court was bound to decide the question and ought not to put the mortgagor on the terms of offering to redeem.

Voluntary Liquidation—Transfer of Shares.

In re **National Bank of Wales** [1896, II Ch. D 851, *Per*: *Vaughan Williams.*]

Where a company is voluntarily wound up, the liquidator, although he may sanction a transfer of shares after the commencement of the winding up, and alter the register of members accordingly, has no power to allow an alteration of the status of the transferor so as to free him from his liability as a contributory. The transfer is effective so as to entitle the transferee to go on the register and claim in his own name any rights as to distribution of surplus or adjustment of the rights of members *inter se.* But the sanction of the liquidator cannot free the transferor from his liability. If that can be done, it must be done under some power which is in the Court and not by the liquidator alone.

In a voluntary liquidation a transferee of shares (with the sanction of the liquidator) is not liable as a contributory, although he may be liable as a member of the company, but he is bound to indemnify the transferor (*vide* S. 175, Act VI of 1882).

Search warrants.

Jones v. **German** [1896, II Q. B. D 418, *Per*; *Lord Russel of Killowen, C.J.*]

The defendant had applied for a search warrant against the plaintiff upon the following sworn information; "he hath just and reasonable cause to suspect and doth suspect that (the plaintiff) has in his possession cer-

tain property belonging to the defendant, that he (the plaintiff) has been in his employ for five years and is now under notice to quit, and that he has requested him (the plaintiff) to allow him to search several boxes which he (the plaintiff) has had packed ready to be taken away, but which he refuses to be looked through."

Upon this a warrant was issued by the Magistrate which was executed. In an action of trespass by the plaintiff against the defendant:

Held, that in an information an allegation that an offence has actually been committed is not necessary to enable a Magistrate to issue a search warrant, but that it is enough if reasonable grounds are alleged for believing that the goods are being feloniously dealt with by the defendant;

that it is not necessary to specify in the information the particular goods for which a search is desired; and

that the information in question (quoted above) was a perfectly proper one upon which a warrant may rightly be issued.

Judgments in rem.

Bellantyne *v.* Mackinnon [1896; II Q. B. D. 455 C. A.]

An action was brought by a shipowner against an under-writer, upon a policy which covered his ship against losses occasioned by the perils of the sea.

The ship had during a voyage run short of coal, and the captain engaged a steam trawler to tow to the port of discharge. The owner of the steam trawler then sued the plaintiff in the Admiralty Court and recovered judgment for a sum of money for salvage. The plaintiff now sued to recover this sum from the under-writer who had insured the ship against the perils of the sea.

Held: (on its appearing from the evidence that, beyond the falling short in coal, the ship was not in any manner of distress, and that she could easily have proceeded under sail), that the loss did not arise by any perils of the sea, but arose solely by reason of the inherent vice of the subject-matter insured, and that the defendant was not precluded by the judgment of the Admiralty Court from setting up that the loss did not arise from any of the perils insured against.

A judgment *in rem* by a court of competent jurisdiction is conclusive against all the world as to the status of the *res*, that is, of the thing

adjudicated upon—in the case in question that a valid maritime lien to the amount already adjudicated upon attached to the ship—but is not conclusive against persons not parties to the suit as to the grounds upon which the judgment must have proceeded.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications :—

The Educational Review for January 1897 (*in exchange*).

Green Bag for January 1897 (*in exchange*).

Allahabad Weekly Notes for January 1897 (*in exchange*).

The Canadian Law Times for January 1897 (*in exchange*).

The Albany Law Journal for January 1897 (*in exchange*).

Pleadings in Indian Courts by Pundit Sheo Narain, Pleader, Chief Court, Panjab, published by the Civil and Military Gazette Press, Lahore.

The Indian Evidence Act with Notes by Sir William Markby, published by Henry Frowde, Oxford University Press, Warehouse, Amen Cornor, E. C., London. Price 3*s.* 6*d.* net.

The Court Fees Act and the Suits Valuation Act with Notes by C. V. Visvanatha Sastri, B.A., B.L., High Court Vakil, Madras, published at the Vijiyanti Press, Egmore, Madras.

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Outwitting a Judge without lying.—A good story is related of a juryman who outwitted a Judge, and that without lying. He ran into Court in a desperate hurry and quite out of breath and exclaimed :—

"Oh ! Judge, if you can, pray excuse me. I don't know which will die first, my wife or my daughter.

"Dear me, that's sad," said the innocent Judge. "Certainly, you are excused."

The next day the juryman was met by a friend, who in a sympthetic voice asked :—

"How is your wife ?"

"She's all right, thank you."

"And your daughter ?"

"She all right too. Why do you ask ?"

"Why, yesterday you said you do not know which would die first."

"Nor do I. That is a problem which time alone can solve".—*The Green Bag.*

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Mr. Justice Brewer on Lawyers.—In an address recently delivered before law students of the University of Maryland, Mr. Justice Brewer, of the Supreme Court of the United States, thus exhibited the humorous side of his character:—

It is a blessed thing to be a lawyer, providing always that you are of the right kind; and I take it, no one is permitted to graduate at this law school unless he is of the right kind. It is the rule of our profession to work hard, live well and die poor. To such a life I most cordially invite you.

Never sign your own name as plaintiff or defendant, but only as counsel.

One class of persons would as soon expect to find a baby that never cried, a woman that never talked, a Shylock loaning money without interest, a Mormon advocating celebacy, a gentleman without a cent opposed to the income-tax or a candidate for the presidency hurrying to empress himself on the silver question, as an honest lawyer.

I admit that lawyers do not support themselves by planting potatoes or plowing corn, though there is many an attorney who would bless himself and bless the bar and bless all of us if he struck his name off the Court rolls and entered it on the books of an agricultural society.

We are not, as a profession physically speaking, like Pharoah's lean kine. Those pictures which Dickens, that prime of slanderers, and others like him, draw and call attorneys, are nothing but atrocious libels.

From time immemorial, size, physical as well as mental, has been considered one of the qualifications of a Judge. Justice and corpulence seem to dwell together. There appears to be a mysterious and inexplicable connection between legal lore and large abdomens. I do not know why this is, unless it be that in order Justice may not easily be moved by the foibles and passions of men, she requires as firm and as broad a foundation as possible.

George Washington's hatchel is not popularly regarded as one of the heirlooms of the legal family. I can say that for over thirty years I have been a judge, and of the many thousands of lawyers who have appeared before me I have never found but a single one upon whose word I could not depend.

While other professions and vocations are constantly putting on striped clothes, how seldom does any lawyer respond to a warden's roll-call?

The business man needs us to draw his contracts, the labourer to collect his wages, the doctor to save him from the consequence of his mistakes, the preacher to compel the payment of his salary, the wife to obtain a divorce and the widow to settle her husband's estate. The people need us in in the legislature and in the Congress to hold the offices and draw the salaries. Every convention and public meeting needs us to fill the chair and occupy comfortable seats on the platform. Every man accused of crime needs us to establish his innocence through the verdict of twelve of his peers.

In short it may be said of us, in the language of itinerant vendor of soap: "every body needs us," and, like that very useful article, nothing tends to keep society so clean as the presence of a lawyer.

Blot from Amrican history the lawyer and all that he has done and you will rob it of more than half its glory. Remove from our society to-day, the lawyer, with the work that he does, and you will leave the society as dry and shifting as the sands that sweep over Sahara.—*American Law Review.*

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Malicious prosecution: Liability of a Municipal Corporation for malicious prosecution.— In the case of *Wilson* v. *Winnepeg*, it was held that a Municipal Corporation may be liable to an action for damages for a malicious prosecution. This decision goes further than any case of which we have knowledge.—*American Law Review.*

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Damages for mutilating dead bodies.—In the case of *Foley* v. *Phelps*, it is held that a wife, as such, may recover damages for the unlawful dissection of the remains of her husband; citing and following a case in Minnesota, where the same was held. Such a recovery was, however, denied by the Supreme Court of Colorado, where the dissection was made in the performance of an autopsy upon the body of one who had died suddenly, in order to enable the physician to give a certificate such as was required by law as to the cause of death.—*American Law Review.*

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The way of the physician is hard.—An interesting example of the extent of a physician's liability for negligence is furnished by a recent decision of the Supreme Court of Massachusetts, *Harriott* v. *Plimpton*, 44 N. E. Rep., 992. The facts of the case were briefly as follows:—The plaintiff, who was engaged to marry the daughter of M., was falsely

accused of being afflected with a venereal disease. M. employed the defendant, a physician, to examine the plaintiff, who consented to the transaction and to report the result to himself and family. The defendant mistakenly pronounced the disease to be venereal. In consequence the engagement was broken. The Court held that the defendant's duty of exercising ordinary diligence, care, and skill in a professional undertaking extended to a case where only information was sought; and that the breaking of the engagement was a damage not too remote to sustain the action. This conclusion, it is submitted, is entirely correct. The evident justice of the result, however, is at first more apparent than the really-substantial grounds of decision which a further consideration of the case reveals.

It is a perfectly well-established principle of law, "that he who undertakes the public practice of any profession undertakes that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character." 2 Beven, Neg., 2d Ed., 1397. (*Sears* v. *Prentice*, 8 East, 348.) This duty arises out of the fact of the undertaking merely, and therefore is not at all dependent upon the existence of any contractual relation. The plaintiff's right to careful and skilful treatment then was in no wise affected because the defendant was employed by M. *Pippin* v. *Shephard*, 11 Price, 400; *Longmeid* v. *Halliday*, 6 Exch., 761, *per* Parke, B., at p. 767; *Dubois* v. *Decker*, 130 N.Y., 325; see also an article on Gratuitous Undertakings, 5 Haward Law Review, 222.

The defendant would have been bound to use due diligence in performing an operation or in prescribing a remedy. Was the duty of care any less in making an examination for the sole purpose of giving information to those interested? If legal damage might result in each case, it would seem irrational to draw distinctions. Legal damage certainly resulted in this case. As early as the sixteenth century, loss of marriage, whether the plaintiff was man or woman, was held to be injury sufficient to support an action of slander. (*Dane. Morrison's Case*, Jenk., 316; *Davies* v. *Gardiner*, Popham, 36; *Mathew* v. *Crasse*, 2 Bulst., 89. There is no reason why it should not equally well support the action for negligence. The only remaining question is whether the damage was too remote. It was surely a natural and proximate result, and in view of the fact that part of the defendant's task was to report to M's family it was not only a probable, but an intended consequence. Unusual as the steps to the decision at first appear, the conclusion is found to be sound in point of principle and law.—*Harvard Law Review.*

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Bills and Notes—Failure of consideration—Sales—Rescission.—Held, that a promissory note given for a pony, the title to the pony to remain in the vendor until payment of the note, and the vendee having the option to rescind the sale before the note is due, is void for failure of consideration, where the pony, died before the option was exercised. *Lyon* v. *Stills*, 37 S. W. Rep., 280 (Kan).

This case stands or falls according to whether the risk of loss was on the vendee or vendor. The principal case is *contra* to the latter view, that it was on the vendee and that the title remained in the vendor simply as security, a sort of chattel mortgage (*Chicago Railway Equipment Co.* v. *Merchants' Bank*, 136 U. S., 268.) The privilege of option should not shift the liability of loss from vendee or vendor. Had the vendee agreed to take the pony if he liked it, instead of agreeing to give it up if he did not like it, the loss would have been on the vendor. *Carter* v. *Wallace*, 42 N. Y., 190; *Hunt* v. *Wyman*, 100 Mass, 198. The Court, however, seem to have lost sight of this distinction, although the facts are somewhat meagrely reported.—*Harvard Law Review.*

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Rules for regulating the practice as to retainers of counsel prepared by the Bar Committee.

Approved by the Attorney-General 3rd June 1892.

Approved by the Council of the Incorporated Law Society 26th June 1892.

General Retainers.

I. General retainers are either ordinary or limited.

II. An ordinary general retainer applies to the Supreme Court and House of Lords.

III. A limited general retainer applies to the tribunal or tribunals or court or courts to which it is expressed to be limited.

IV. A separate general retainer must be given for the Privy Council.

V. A separate general retainer must be given for Parliamentary Committee.

VI. If the counsel who has accepted a general retainer from one party should be offered a special retainer or brief by another party, the general retainer entitles the party who has given it to reasonable notice before the offered special retainer or brief is accepted.

VII. Subject to these rules a general retainer lasts for the joint lives of the client and counsel, unless the same be forfeited.

VIII. In case a special retainer or brief is offered to counsel by a party other than the party from whom he has accepted a general retainer, the counsel after giving notice to the party from whom he has accepted the general retainer of the offer of the special retainer or brief, is at liberty to accept the special retainer or brief of the other party, unless a special retainer or brief be given within a reasonable time by the party from whom he has accepted the general retainer.

IX. Where a general retainer has been given and a brief is not delivered to the retained counsel in any action or other proceeding in which the party giving the general retainer is concerned, and to which it applies, or a special retainer or brief is not given within a reasonable time after a notice has been given by the counsel holding a general retainer, that a special retainer or brief has been offered to him by another party, the general retainer is forfeited; provided that the holding of a general retainer does not entitle a Queen's Counsel to the delivery of a brief on occasions when it is usual to instruct a junior counsel only.

X. Where a general retainer has been given for one person, and he is party to a proceeding with others and appears separately, the retainer applies to that proceeding; but if he appears jointly with others, the retainer does not apply, and remains unaffected.

Special Retainers.

XI. A special retainer cannot be given until after the commencement of an action, appeal, or other proceeding.

XII. A special retainer in an action or proceeding in the Supreme Court gives the client a right to the services of the counsel while the action or proceeding remains in or under the control of that court.

XIII. A special retainer in an action or proceeding other than an action or proceeding in the Supreme Court gives the client a right to the services of the counsel during the whole progress of such action or proceeding.

XIV. A counsel who has been specially retained is entitled to the delivery of a brief on every occasion to which the special retainer applies; provided always:

> A special retainer does not entitle a Queen's Counsel to the delivery of a brief on occasions when it is usual to instruct junior counsel only.

Where more than one junior counsel has been retained, only one of such junior counsel is entitled to the delivery of a brief on occasions when it is usual to instruct one junior counsel alone.

See the report referred to in the note to rule 20 Infra.

Circuit Retainers.

XV. A special retainer must be given for a particular assize.

XVI. If the venue be changed for another place on the same circuit, a fresh retainer is not required.

XVII. If the action be not tried at the assize for which the retainer is given the retainer must be renewed for every subsequent assize until the action is disposed of, unless a brief has been delivered.

XVIII. A retainer may be given for a future assize; without a retainer for an intervening assize, unless notice of trial shall have been given for such intervening assize.

Appeals.

XIX. When a counsel has held a brief for any party in action or proceeding but has not received a general or special retainer, he shall not accept a general retainer or special retainer or a brief on appeal (including in that expression appeals to the House of Lords and to the Privy Council) for any other party, without giving the original client the opportunity of retaining or delivering a brief to him.

Opinions and Pleadings.

XX. Counsel who has drawn pleadings or advised or accepted a brief, during the progress of an action on behalf of any party shall not accept a retainer or brief from any other party without giving the party for whom he has drawn pleadings or advised, or on whose behalf he has accepted a brief the opportunity of retaining or delivering a brief to him; but such counsel is entitled to a brief at the trial and on any interlocutory application where counsel is engaged; unless express notice to the contrary shall have been given to him with instructions to draw such pleadings or advise, or at the time of the delivery of such brief; provided always, such counsel shall not be entitled to a brief in any case where he is unable or unwilling to accept the same without receiving a special fee.

See the report of the General Council at the Bar upon a case submitted to them under this rule, 30 L. J. N. C., 136.

XXI. No counsel can be required to accept a retainer or brief or to advise or draw pleadings in any case where he has previously advised another party on or in connection with the case, and he ought not to do so in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other party, or in which his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him, and in any such case it is the duty of the counsel to refuse to accept such retainer or brief, or to advise or to draw pleadings and in case he has received such retainer or brief inadvertently, to return the same.

Promotion of Counsel.

XXII. The retainer of a counsel does not cease upon his being promoted to a higher rank at the bar.

Amount of Fees.

XXIII. The fees for general retainers are as follows:—

In Parliament (Committees)	Ten guineas.
In all other cases	Five guineas.

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PRE-AUDIENCE OF THE ADVOCATE-GENERAL.

(Re-printed from Brooke's Reports.)

CORAM NORMAN J:—The Officiating Advocate-General having claimed pre-audience, the claim was questioned by the senior member of the bar, but was allowed.

Held, that down to the transfer of the Government of India to Her Majesty, the Advocate-General of the East India Company, was not entitled as such to pre-audience in the Courts with a patent of precedence;

that the Attorney and Solicitor-General in England enjoy precedence as representing the Sovereign and not by patent;

that the Advocate-General and Officiating Advocate-General, for the time being, are entitled to similar precedence as the Attorney-General in England.

On the motion being called on to-day according to the order of seniority at the bar, the Officiating Advocate-General, Mr. Graham, said; "I feel it my duty to submit to your Lordship the question whether, as holding the post of the chief law officer of Her Majesty in this Presidency, I am not entitled to precedence in the Court. I do this with full

respect for my learned friends whose calls to the bar may date prior to my own. But I consider I am bound to uphold the just rights of the office with which the Government of the country has thought fit to entrust me. Having asserted this claim, I shall leave it to your Lordship to determine as to its validity."

BELL;—I am glad that this question should be discussed in a friendly way. But I think the application of my learned friend wholly without precedent. When the Advocate-Generals were Advocate-Generals of the East India Company, they were Advocate-Generals of the Sovereign power in India, and when the country was transferred to the Queen, the position of Advocate-General was not materially altered, for every Crown business was conducted by the Advocate-General by the direction of the East India Company. When the Advocate-General came out from England with a complete appointment, it was usual for the bar to give him the same seniority as that the Attorney-General had in England. That was the case with Mr. (afterwards) Sir Charles Jackson. He afterwards obtained a patent of precedence. In Mr. Turton's case the claim was not general here, as the chief law officer was the proper person to file information on the part of the Crown. Moreover, since Mr. Turton's time the form of the Government of the country has changed, and the office is now held immediately of the Crown itself, and the acting office is conferred by the Viceroy as representing the Crown.

NORMAN J.—Mr. Graham as Officiating Advocate-General claims a right of pre-audience and it appears that a similar right was claimed by Mr. Turton, Officiating Advocate-General in January 1840, when the late Supreme Court intimated the inclination of their opinion against it, and the claim was not then pressed. See Mortan's Report, (p. 283.) On referring to the Crown Office, I find that patents of precedence and pre-audience in all Courts were granted to Messrs. Peele, Lyall, Covile, Jackson, Ritchie, whose patent is dated on 1st November in the 19th year of the reign of Her present Majesty. It appears to be clear that down to the date of the transfer of the Government of India to Her Majesty the Advocate-General of the United Company of Merchants Trading to the East Indies though for certain purposes entitled to represent the King under the Statute 53 Geo. III, ch. 155, was not as such entitled to pre-audience in the Courts without a patent of precedence. But by the 21 and 22 Vict., ch. 106, the Government and the territories of the E. I. Co. became vested in Her Majesty. By S. 29 it was enacted that the appointment of Advocate-General should be made by Her Majesty under Her Royal Sign Manual. By S. 30 it was enacted that appointment to offices and employment in India, which by law or under any

regulation, usage or custom were then made by any authority, in India, should continue to be made in India by the like authority and by S. 58 persons holding offices or employments under the Company in India are thenceforth to be deemed to hold such offices under Her Majesty. The effect of these enactments is that the Advocate-General is now the Advocate-General of Her Majesty, and the same observations apply to the Officiating Advocate-General whose appointment I imagine comes under the 36th Section of 21 and 22 Vict., ch. 106. On enquiry I find that Mr. Cowie, whose appointment was since the passing of the above Act, has never filed the patent of precedence which he possesses. In the English Courts, the Attorney and Solicitor-General and all the King's counsel are entitled to precedence over other members of the bar, and amongst those included in the King's warrant rank the Attorney and Solicitor-General of the Queen Consort apparently, not by virtue of any patent of precedence, but on account of the Queen Consort whom they represent in Court. (1 Blackstone's Commentaries, p. 219.) It is evident from the long contest for precedence between the Sargeants and the Attorney and Solicitor-General in England, which is alluded to by Lord Coke in the preface to the Tenth Report and by Lord Campbell in the Lives of the Lord Chancellors, Vol. II, p. 292, that precedence was ultimately accorded to the Attorney and Solicitor-General as representing the Sovereign and not by virtue of any special patent of precedence. For if there had been such patent, there could have been no contest. The Royal Mandate in 1864, which for the first time gave to the Attorney and Solicitor-General precedence and pre-audience before the King's Premier Sargeant and the King's ancient Sargeant (See 6 Taunton, 424, and 2 Vesay and Beame, 422) merely regulates the order of precedence amongst those who are already His Majesty's counsel. I do not think that the Royal Warrant of Precedence of July 1862 giving to the Advocate-General rank with the first class of Civil Servant in any way affects the present question. But upon the grounds already alluded to I think that since the passing of the statute 21 and 22 Vic. ch. 101, the Advocate-General and the Officiating Advocate-General for the time being are entitled to pre-audience.

REVIEWS.

The Madras Rent Recovery Act, VII of 1865, with Notes by *B. Krishna Rao*, B.A., B.L., High Court Vakil, Salem, published by Messrs. Srinivasa Varadachari & Co.:—

This is a modest but useful book of reference on the Madras Rent Recovery Act. Annotators of Acts often commit the fault of giving at length the facts of cases referred to, thus increasing the size of the books and increasing the labour of finding out the points decided. The statement of the facts of cases referred to can never dispense with the necessity for consulting and quoting the original reports. Mr. Krishna Rao is quite free from this fault and gives only the points decided in cases quoted by him. Reference has been rendered easy by copious marginal notes.

The Court Fees Act and Suits Valuation Act by *C. V. Visvanatha Sastri*:—

This is a very neat and useful annotated edition of the Court Fees and Suits Valuation Acts. The notes are clear, succinct, well arranged and full. We congratulate Mr. Visvanatha Sastri on his performance and hope he will follow up this work by annotations of other Acts. The get-up of the book leaves nothing to be desired. Another useful feature of the book is that the author has adopted the new English practice of giving the years of the cases cited.

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* 1865, May, 2.

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Bell;—I am glad that this question should be discussed in a friendly way, but I think the application of my learned friend wholly without precedent. When the Advocates-General were Advocates-General of the *East India Company*, they were Advocates-General of the Sovereign power in *India*, and when the country was transferred to the Queen, the position of Advocate-General was not materially altered. Formerly, Crown business was conducted by the Advocate-General by the direction of the *East India Company*. When the Advocate-General came out from *England* with a complete appointment, it was usual for the Bar to give him the same seniority that the Attorney-General had in *England*. That was the case with Mr. (afterwards *Sir Charles*) *Jackson*. He afterwards obtained a patent of precedence. In *Mr. Turton's* case the claim was not general as here, as the Chief Law Officer was the proper person to file information on the part of the Crown. Moreover, since *Mr. Turton's* time the form of the Government of the Country has changed, and the office is now held immediately of the Crown itself, and the acting office is conferred by the Viceroy as representing the Crown.

NORMAN J.—*Mr. Graham*, as Officiating Advocate-General, claims a right of pre-audience and it appears that a similar right was claimed by *Mr. Turton*, Officiating Advocate-General in January 1840, when the late Supreme Court intimated the inclination of their opinion against it and the claim was not then pressed; See *Morton's Reports*, (*p.* 283.) On referring to the Crown Office, I find that patents of precedence and pre-audience in all Courts were granted to *Mr. Peele, Mr. Lyall, Mr. Colville, Mr. Jackson, Mr. Ritchie*, whose patent is dated on 1st of *November* in the 19th year of the reign of Her present Majesty. It appears to be clear that down to the date of the transfer of the Government of *India* to Her Majesty, the Advocate-General of the United Company of Merchants Trading to the *East Indies* though for certain purposes entitled to represent the King under the Statute 53 Geo. III, ch. 155, was not, as such, entitled to pre-audience in the Courts without a patent of precedence. But by the 21 and 22 Vict., ch. 106, the government and the territories of the E. I. Co. became vested in Her Majesty. By S. 29 it was enacted that the appointment of Advocate-General should be made by Her Majesty

under Her Royal Sign Manual. By S. 30 it was enacted that appointments to offices and employment in *India*, which by law or under any regulation, usage or custom were then made by any authority in *India*, should continue to be made in *India* by the like authority and by S. 58 persons holding offices or employments under the Company in *India* are thenceforth to be deemed to hold such offices under Her Majesty. The effects of these enactments are that the Advocate-General is now the Advocate-General of Her Majesty; and the same observation applies to the Officiating Advocate-General whose appointment I imagine comes under the 30th Section of 21 and 22 Vict., ch. 106. On enquiry I find that Mr. *Cowie*, whose appointment was since the passing of the above Act, has never filed the patent of precedence which he possesses. In the English Courts, the Attorney and Solicitor-General and all the King's counsel are entitled to precedence over other members of the bar, and amongst those included in the King's warrant rank the Attorney and Solicitor-General of the Queen Consort apparently, not by virtue of any patent of precedence, but on account of the Queen Consort whom they represent in Court. (1 *Blackstone's Commentaries p.* 219.) It is evident from the long contest for precedence between the Sergeants and the Attorney and Solicitor-General in *England*, which is alluded to by *Lord Coke* in the preface to the 10th Report and by *Lord Campbell* in the *Lives of the Lord Chancellors*, Vol. II, p. 292, (*Note*) that precedence was ultimately accorded to the Attorney and Solicitor-General as representing the Sovereign and not by virtue of any special patent of precedence, for if there had been such patent, there could have been no contest. The Royal Mandate of 1864, which for the first time gave to the Attorneys and Solicitors-General precedence and pre-audience before the King's Premier Sergeant and the King's Ancient Sergeant (See 6 Taunton, 424, and 2 Vesey & Beames, 422) merely regulates the order of precedence amongst those who were already His Majesty's Counsel. I do not think that the Royal Warrant of Precedence of *July* 1862 giving to the Advocate-General rank with the first class of Civil Servants in any way affects the present question. But upon the grounds already alluded to I think that since the passing of the Statute 21 and 22 Vic. ch. 106, the Advocate-General and the Officiating Advocate-General, for the time being, are entitled to pre-audience.*

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* This ruling of Norman J, has, we are informed, been followed in subsequent cases in Calcutta and the practice in Bombay seems also to be in accordance with it. [E. D.]

REVIEWS.

The Madras Rent Recovery Act, VIII of 1865, with Notes by *B. Krishna Rao*, B.A., B.L., High Court Vakil, Salem, published by Messrs. Srinivasa Varadachari & Co.:—

This is a modest but useful book of reference on the Madras Rent Recovery Act. Annotators of Acts often commit the fault of giving at length the facts of cases referred to, thus increasing the size of the books and increasing the labour of finding out the points decided. The statement of the facts of cases referred to can never dispense with the necessity for consulting and quoting the original reports. Mr. Krishna Rao is quite free from this fault and gives only the points decided in cases quoted by him. Reference has been rendered easy by copious marginal notes. Another useful feature of the book is that the author has adopted the new English practice of giving the years of the cases cited.

The Court Fees Act and The Suits Valuation Act by *C. V. Visvanatha Sastri*, B.A., B.L., High Court Vakil, Madras:—

This is a very neat and useful annotated edition of the Court Fees and Suits Valuation Acts. The notes are clear, succinct, well arranged and full. We congratulate Mr. Visvanatha Sastri on his performance and hope he will follow up this work by annotations of other Acts. The get-up of the book leaves nothing to be desired.

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THE ADVOCATE-GENERAL.

The office of Advocate-General is that of chief law officer of the Crown in the different provinces subject to the Government of India. The origin of this appointment is lost in obscurity. . All that we are now able to discover is that the Statute 21, Geo. III, ch. 70, S. 28, in providing indemnity for certain officers for acts done by them in conflict with the Supreme Court of Calcutta refers to the Advocate-General. In various Statutes of the last century relating to India reference is made to Councillors at law, who are servants of the Company, being entitled to practise their profession without subjecting themselves to any penalty for receiving or accepting fees or gratuities in the way of their profession. See 13, Geo. III, ch. 63; 24, Geo. III, ch. 25, S. 48; and 33, Geo. III, ch. 52, S. 64.

We find again in 37, Geo. III, ch. 142, S. 29, a reference to the Company's law officers providing that their opinion should be taken by the Governments in this country and submitted to the Court of Directors in the case of any complaint to the Government of any acts done contrary to the provisions of that Statute. In the charters of the Supreme Courts of Calcutta, Madras and Bombay issued respectively in the years 1774, 1800 and 1823, there is no reference to the Advocate-General, though in clause 16 of the Calcutta Letters Patent of 1774, in clause 30 of the Madras Letters Patent of 1800, and in clause 40 of the Bombay Letters Patent of 1823, there is a reference to the Attorney of the Company. We find no statutory provision relating to the appointment of Advocate-General until we come to 53, Geo. III, ch. 155, which enacts in S. 81 "that from and after the passing of this Act, it shall not be lawful for the said Court of Directors either provisionally or otherwise to nominate or appoint any person to succeed

to any office or employment in the Civil or Military establishments of the said Company in the East Indies, or parts aforesaid, without the approbation of the said Board of Commissioners * * *; provided always that nothing herein contained shall prevent or hinder the said Court of Directors from nominating or appointing absolutely or provisionally *such persons as they may think fit to the offices of Member of Council, General officer on the staff, Advocate and Attorney-General, Attorney at Law of the said Company* or Chaplain at the several Presidencies or Settlements or to any offices or employments in the Civil or Marine establishments of the said Company which may be and usually have been supplied by persons not having been Covenanted Servants of the said Company previously to their nominations or appointments * * *." Thus according to this Statute which renewed the Company's charter, the Court of Directors had the power to appoint such person as they thought fit to the office of Advocate-General. The Statute prescribed no qualifications for the office, and the Court of Directors were free, therefore, to choose any person they liked. The Company's charter was renewed in the year 1833 by the Statute 3 & 4, William IV, ch. 85. S. 2 of this Statute enacted "that all and singular the privileges, franchises, abilities, capacities, authorities, whether military or civil, rights, remedies, methods of suit, penalties, forfeitures, disabilities, *provisions, matters and things* whatsoever, granted to or continued in the said United Company by the said Act of the 53rd year of King George III, for and during the term limited by the said Act and *all other the enactments, provisions, matters and things contained in the said Act or in any other Act or Acts* whatsoever, which are limited or may be construed to be limited to continue for and during the term granted to the said Company by the said Act of the 53rd year of King George III, so far as the same, or any of them, are in force * * * and all powers of alienation and dispositions, rights, franchises and immunities which the said United Company now have shall continue and be in force and may be exercised and enjoyed as against all persons whomsoever, subject to the superintendence, direction and control hereinbefore mentioned, until the 30th day of April 1854." By virtue of this provision, the power of the Court of Directors to appoint to the office of Advocate-General such person as they thought fit was continued till the year 1854. The

"superintendence hereinbefore referred to" in the section is set out in S. 1 of that Statute as "such powers and authorities for the superintendence, direction and control over the acts, operations and concerns of the said Company as have been already made or provided by any Act or Acts of Parliament in that behalf or one made or provided by this Act." We come next to the Statute 16 & 17 Vic. ch. 95, enacted in the year 1853, S. 29 of which provides that "no appointment of the said Advocate-General of the said Company shall be valid without the approbation of the Board of Commissioners for the affairs of India." Although by the Statute 53 Geo. III, ch. 155, the power of appointment to the office of Advocate-General was vested in the Court of Directors and that power was continued by the Statute 3 and 4 William IV, ch. 85, officiating appointments to the office were made by the respective Governments of the Company in India under the authority of the Court of Directors; and these Local Governments were directed to choose a *competent* person for the office.* The appointment by the Court of Directors was rendered subject to the approbation of the Board of Control by S. 29 of the Statute 16 & 17 Vic. ch. 95. The power of making the officiating appointment which apparently rested with the Local Governments was left undisturbed. By S. 1 of that Statute it was enacted that "until Parliament shall otherwise provide, all the territories now in the possession and under the Government of the East India Company shall continue under such Government in trust for Her Majesty, her heirs and successors *with and under the powers and restrictions* and subject to the superintendence, direction and control now by law applicable to such Government and subject also to the provisions of this Act and all the provisions now in force of the said Act of the 3rd & 4th years of King William IV and *all other enactments whatsoever now in force with* relation to the said Company and Government and territories respectively *shall, save so far as the same are altered by or are repugnant to this Act, continue in force,* after the said 30th day of April 1854 as if the said term had not expired."

We come next to the year 1858, when the Government of India was transferred to the Crown. The power of appointment of Advocate-General was then in the Court of Directors subject to the

* See note page 68.

Board of Control; and officiating appointments were being made by the Local Governments concerned. The Statute 21 and 22 Vic. ch. 106 came into force in the year 1858. S. 29 of that Act enacted that the *appointment of Advocate-General* for the several presidencies now made by the approbation of the Commissioners for the affairs of India *shall be made by Her Majesty by warrant under Her Royal Sign Manual*; * * * and such appointments shall be subject to the *qualifications now by law affecting such offices* respectively." The reference to qualifications in this section was evidently made having regard to the fact, that several other offices were also dealt with by the section as to some of which, qualifications had been prescribed by law; as, for example, that of 4th ordinary member of the council of the Governor-General of India. S. 30 of the Statute enacts that "all appointments of offices, commands and employments in India and all promotions which by law or under any regulations, usage or custom are now made by any authority in India shall continue to be made in India by the like authority and subject to the qualifications, conditions and restrictions now affecting such appointments respectively." The officiating appointment of Advocate-General was one of those which by regulation, usage or custom were being made by the Local Governments in India; and as regards the qualification, we have already seen that he must be merely a competent person. There is no later statutory provision regarding appointment to this office or the qualifications of the holder of it. But we may refer to S. 29 of the Statute 25 & 26 Vic. ch. 67, which makes mention of the Advocate-General of the Presidency or officer acting in that capacity as further indicating the distinction we have drawn between the power to make the permanent appointment and the power to appoint provisionally which appears from Ss. 29 and 30 of 21 & 22 Vic. ch. 106. This examination of the Statutes necessarily leads to the conclusion that at present the authority entitled to make the permanent appointment is Her Majesty the Queen and that the Local Government is entitled to make the provisional or acting appointment and that there are no special qualifications prescribed by law or usage, within the meaning of the 29th and 30th sections of the Statute 21 and 22 Vic. ch. 106.

The fact that advocates of the Supreme Court were selected to fill the office when the Supreme Court was in existence or that,

since their abolition, advocates of the High Court have been selected or that the persons so selected happened to be barristers of England or of Ireland proves nothing more than that a competent person was found in their ranks by the authority entrusted with the power of making the selection. It may also be not irrelevant to add that it is of some significance that while the Statutes creating the Supreme Courts of Calcutta, Madras and Bombay in the years 1773, 1799 and 1823, respectively, specified the qualifications of the judges that they should be barristers of England or Ireland and the Statute authorizing the creation of the Court of the Recorder of Madras, 37, Geo. III, ch. 142, also prescribes the qualifications of the Recorder that the Recorder should be a barrister of England or Ireland, the Statute 53, Geo. III, ch. 155, and other Statutes which relate to the appointment of Advocate-General make no reference to the qualifications of the holder of that office.

It is not improbable that in the minds of men unacquainted with the history of the appointment or the statutory provisions regarding it, an impression should arise that the name of the office involves that the holder should be an advocate. It is hardly necessary to point out that the name of an office cannot determine the qualifications which by law the holder is required to possess. We would only refer to the office of Government Pleader in this country which in the town of Madras has generally been held by a barrister who is not a pleader in the limited or technical sense of that term. Indeed the definition of the term in S. 2 of the Code of Civil Procedure is that it includes "any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader."

We have hitherto considered the question of the legality of an appointment to the office of Advocate-General of a person who is not an advocate. It may be also proper to regard the matter from another point of view as to whether the interests of Government could be properly served by a person holding the office of Advocate-General who is not himself an advocate. It cannot be disputed that the only point of view which may legitimately affect the determination of the question is whether the person selected has a right of audience in the High Court in the exercise of its several jurisdictions. Under the rules of the Madras High Court, a vakil is entitled to

appear, plead and act both on the Original and the Appellate sides of the High Court. He has also the same right to appear in the exercise of the criminal jurisdiction possessed by the High Court. As regards the Insolvent Court presided over by one of the Judges of the High Court, we have shown in our article in 6 M. L. J., p. 473, that a vakil is entitled to appear for a party in that Court under the provisions of S. 4 of Act XVIII of 1879, the Insolvent Court being subordinate to the High Court within the meaning of the words of that section. Even if a vakil were not entitled to appear as of right in any branch of the High Court, there would be nothing wrong in the Government selecting somebody duly qualified to transact the particular business which the Government may have in that Court. But we find, however, that the Advocate-General, whoever he may be, is entitled by virtue of his office to appear on behalf of Government in all matters in which the Government has any interest. Statute 53, Geo. III, ch. 155, S. 111, authorizes the Advocate-General to exhibit in the Supreme Court (now the High Court) any information or informations in the nature of an action or actions at law or of a bill or bills in equity for or in respect of any matter, cause or thing whatsoever as fully and effectually to all intents and purposes as Her Majesty's Attorney-General for the time being is by law authorized to exhibit any such information or informations in any of Her Majesty's Courts of Equity in this country." In a case reported in 4 M. I. A., 190, an attempt was made in the Supreme Court to restrict the right of the Advocate-General by confining his right to represent the Crown to matters involving pecuniary interests only. It was a case where the Advocate-General moved to interfere in the administration of a charity, and the Supreme Court having refused to hear the Advocate-General, he appealed to the Privy Council. Lord Langdale delivering the judgment of the Privy Council in *Attorney-General* v. *Brodie* at p. 200 of the Report says: "then arises the question whether the Advocate-General ought to be heard. Now it appears to us, if we are to rely upon the Statute alone, the words of the enactment are quite sufficient and the effect of them is not abridged by the statement of the particular purpose which is set forth in the preamble. There is an end of the matter." We may also draw attention to S. 417 of the Code of Civil Procedure which enacts that the persons authorized to act for Government in respect of any judicial proceeding shall be deemed

to be the recognised agents by whom appearances, acts and applications under the Code may be made or done on behalf of Government. Although Act XIII of 1895 enables the High Court to frame rules for the procedure of the Original Side of the High Court, S. 417 still applies to the Original Side, unless the High Court has framed any rule in conflict or at variance with that section. As no such rule has been framed, it follows by virtue of the provisions of S. 417, that the Advocate-General would by virtue of his office be entitled to appear in any judicial proceeding under the Code; but as already pointed out by us, S. 111 of 53 Geo. III, ch. 155, on which the widest interpretation has been placed by the Privy Council entitles the Advocate-General to appear in all branches of the High Court—a power which Act XIII of 1895, or any rules framed under it cannot touch. The above section suggests a comparison of the office of Advocate-General with that of the Attorney-General in England. The Attorney-General is now the chief law officer in England and was formerly one of the principal law officers. Barristers who were not serjeants-at-law had formerly no right of audience in the Court of Common Pleas. But the serjeants-at-law had the exclusive privilege of audience in that Court. And notwithstanding the royal warrant of 1831 abolishing the exclusive right, the Court of Common Pleas refused to be bound by it and denied audience to barristers who were not serjeants. See the case of *The Serjeants* in 6 Bingham's N. C., p. 235. But notwithstanding the stringency with which the Court of Common Pleas guarded the privileges of the serjeants the Attorney-General who happened to be not a serjeant was held entitled by virtue of his office to right of audience in that Court in a cause in which the Crown was interested, see *Paddock* v. *Forester*, 8 Dowling, 834. This decision with regard to the Attorney-General is instructive as regards the position of the Advocate-General in India. He seems to us to be similarly entitled, as representing the Crown, to audience in all Courts in the land although as a vakil or attorney he may not ordinarily be entitled to audience in particular courts. Judged therefore by the test of convenience, from the point of view of the Government that appoints, the appointment to the office of Advocate-General of a person who is not an advocate is perfectly legal and proper. We shall on a future occasion refer to other aspects of the question which point to our minds the desira-

bility of not reserving the office of Advocate-General to barristers and advocates only.

NOTE.—We have been able to procure an authenticated copy of the despatch of the Court of Directors which we reprint below.

Despatch No. 1 OF 1831.

LAW DEPARTMENT.

OUR GOVENOR IN COUNCIL AT FORT ST. GEORGE.

1. The Bengal Government having submitted for our decision a question raised by the Government of Bombay as to the mode of providing for the discharge of the duties of Advocate-General in the temporary absence of that officer, we have to acquaint you that our decision is as follows, *viz.*

2. Whenever our Advocate-General or Attorney may quit the Presidency and proceed to sea, the Local Government is to appoint a competent person to act during his absence, the absentee receiving one half of the salary for a period of his absence not exceeding 18 months and the *locum tenens* receiving the other half for that period, and after its expiration the whole. In cases of absence a second time, such as that of Mr. Poe, the absentee is to receive no part of the salary, the whole of which is to be paid to the Officiating Advocate or Attorney.

We are,

your loving friends.

(Signed)	William Astill.	(Signed)	Hy. Alexander.
(„)	Robert Campbell.	(„)	J. Thornhill.
(„)	H. Lindsay.	(„)	George Lyall.
(„)	John Morris.	(„)	William Young.
(„)	G. Raikes.	(„)	C. Elton Prescott.
(„)	J. L. Lushington.	(„)	Wm. Stanley Clarke.
(„)	J. PettyMuspratt.	(„)	J. Masterman.
(„)	J. Baillie.		

LONDON,
The 23rd February 1831.

PRINCIPLES OF LIMITATION IN RELATION TO OTHER ACTS.

I propose to consider in this article the applicability of the general principles of limitation as laid down in sections 4 to 25 of Act XV of 1877, to other Acts. In other words, the point for determination is whether the general principles so laid down are of general application, or whether they are applicable only to suits falling under the second schedule of the Act. The question practically turns upon the construction to be put on section 6 which runs as follows:—

"Where by any special or local law now or hereafter in force "in British India, a period of limitation is specially prescribed for "any suit, appeal or application, nothing herein contained shall "affect or alter the period so prescribed."

In this connection it will be well to bear in mind the corresponding sections in the Acts of 1859 and 1871, for a due understanding both of the course of legislation on the subject, and of the cases decided thereunder. They are S. 3 of Act XIV of 1859 and S. 6 of Act IX of 1871, and run as follows:—

"When by any law now or hereafter in force a shorter period "of limitation than that prescribed by this Act is specially pre- "scribed for the institution of a particular suit, such shorter limita- "tion shall be applied, notwithstanding this Act."

"When by any law not mentioned in the schedule hereto "annexed and now or hereafter to be in force in any part of British "India, a period of limitation differing from that prescribed in this "Act is specially prescribed for any suit, appeal or application, "nothing herein contained shall affect such law."

Prior to 1859, there were different systems of limitation law, not only in the different Presidencies, but also in different courts in the same Presidency. There was also Regulation III of 1793. In dealing with the question at issue, I shall first confine myself to section 6, then deal with the application made of the general principles by the various High Courts; and, lastly, I shall try to deduce certain principles which, I hope, will prove of general application.

The foundation of S. 6 is the maxim '*Generalia specialibus non derogant.*' This maxim has long been recognised by the laws of

England, and finds also a place in the jurisprudence of other countries. In *Gregory's Case*, 6 Rep. 19, *Lord Coke* observes that a later statute in the affirmative shall not take away a former Act, and *es potior*, if the former be particular and the later general.' *Lord Hardwicke* in *Middleton* v. *Crofts*, 2 Atk., 650, *is* to the same effect. *Sir Orlando Bridgman* in *Lyn* v. *Wyn*, Bridgman's judgments 122—27, is of opinion that 'the law will not allow the exposi- 'tion to revoke or alter by construction of general words, any 'particular statute, where the words may have a proper operation 'without it.' This view is approved of by *Montague Smith, J.*, in *Conservators of the Thames* v. *Hall*, L. R., 3 C. P., 421. In *Thrope* v. *Adams*, L. R., 6 C. P., 135, *Bovill, C. J.*, observes that 'the general principle to be applied to the construction of Acts of Parliament is, that a general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless there is necessary inconsistency in the two Acts standing together.' *Kutner* v. *Phillips*, L. R., 1891, 2 Q. B., 272, lays down the same rule; and in *Abergavenny* v. *Brace*, L. R., 7 Exch, 170, *Channell, B.*, observes that a Statute prescribing rules for special subjects is not controlled by subsequent legislation of a general character. In this connection I will do well to refer to the opinion of *Mr. Maxwell*, and I cannot do better than by quoting his own words: "A general Statute "is usually presumed to have only general cases in view, and not "particular cases which have been already otherwise provided for "by the special Act. Having already given its attention to the parti- "cular subject, and provided for it, the Legislature is reasonably "presumed not to intend to alter that special provision by a "subsequent general enactment, unless that intention is manifested "in explicit language, or there be something which shows that "the attention of the Legislature has been turned to the special "Act, and that the general one was intended to embrace the special "cases within the previous one, or something in the nature of the "general one making it unlikely that an exception was intended as "regards the special Act. The general Statute is read as silently "excluding from its operation the cases which have been provided "for by the special one." (Interpretation of Statutes, 3 Ed., p. 243.) To the foregoing there is an exception, which, in the words of the same learned author is as follows; "The maxim under con-

"sideration ceases to be applicable when there is in the Act or in its "history something showing that the attention of the Legislature had "been turned to the earlier special Act, and that it intended "to embrace the special cases within the general Act, or something "in the nature of either Act, to render it unlikely that any excep-"tion was intended in favour of the special Act." (Page 250.) Considering the exception first, the history of S. 6 may be briefly stated as follows: As already stated, prior to 1859, the law in force was Reg. 3 of 1793. There were also various other local laws of limitation. Reg. 3 was of general application and there was no section in it corresponding to this section. Act XIV of 1859 for the first time imported a limitation as to the scope of the Act, by providing in S. 3 that shorter periods of limitation if prescribed by other Acts were to be applied to cases arising thereunder, notwithstanding anything contained in the general Act.. Reg. 3 having been of general application, and the Act of 1859 having taken its place, it was held in cases decided under it that the general principles therein laid down were also of general application. (*Mahomed Bahadur Khan* v. *Collector of Bareilly*, 13 Beng. L. R., 292.) A change was effected by Act IX of 1871 by reason of the concluding words of S. 6 being to the effect that nothing contained in the Act shall affect other laws, and not as in the Act of 1859 whereby the special periods of limitation prescribed by other Acts were to be applied, notwithstanding anything contained in it. It was consequently held that the general principles therein laid down did not apply to special and local laws. Thus S. 5, which corresponds to the same section of the present Act was held not to apply to suits under S. 25 of the Madras Forest Act XXVIII of 1860. (*Thir Singh* v. *Venkataramier*, I. L. R., 3 M., 92). Section 6 of the present Act is worded in terms similar to those contained in S. 3 of the Act of 1859, by enacting that the periods of limitation contained in local and special laws shall remain unaffected by anything contained in the second schedule. It has consequently been held that, upon a true construction of the section, the general principles of limitation laid down in sections 5–25 apply to special and local laws. (*Kullayappa* v. *Lakshmipathi*, I. L. R., 12 M., 467–71; *Nijabutoola* v. *Wazir Ali*, I. L. R., 8 C., 910; and *Gurácharyá* v. *President of the Belgaum Municipality*, I. L. R., 8 B., 529.) It must not be supposed from what has been said above that the question under consideration is

free from any difficulty whatever. The recent decisions in *Viramma* v. *Abbiah*, I. L. R., 18 M., 99, and *Girija Nath Roy Bahadur* v. *Patani Bibee*, I. L. R., 17 C., 263, have introduced into the consideration of the subject principles which though not of recent origin, were nevertheless ignored in deciding the previous cases. I shall now deal with the general principles laid down in the various sections, and the cases wherein they have or have not been applied to special Acts.

The first principle which demands consideration is that embodied in S. 4. This section sounds the keynote of the whole Act, by enacting that suits instituted, appeals presented and applications made, after the period of limitation prescribed therefor shall be dismissed. There is no corresponding section in, if I am not mistaken, any other Act of the Indian Legislature, and the question is whether in cases arising thereunder, the same rule is to be observed. It may be said that whenever the Legislature fixes a period within which a particular act is to be done, no validity attaches to the act if done after the period prescribed. If this is a general principle of jurisprudence, then, why is mention made of it only in Act XV of 1877. Moreover, legislation by implication is always to be avoided, especially when it is derogatory to the rights of the subject. The point has not been decided by our High Courts in any case, statutes of limitation being statutes of repose, the object whereof is to prevent endless litigation by placing a limit thereto, it is reasonable to suppose, that the courts of law are not to take any judicial notice of endeavours made to set its machinery in motion after the period prescribed therefor. The absence of any authority to the contrary leads us also to the same conclusion. An inference to the same effect might be drawn from the case (*Reference under Forest Act*, V of 1882, I. L. R., 10 M., 210) wherein it was held that cl. 2 of S. 5 applied to appeals under the Forest Act of 1882; for the power therein conferred can only be exercised on account of the disability arising under this section.

The first clause of S. 5 is founded on the principle that no man is to be prejudiced by things beyond his control. The closure of the Court is an act of the Court itself, and one over which the suitor has no control. If, therefore, a person is unable to exercise his rights, not by virtue of any act of his own, but by reason of some act on the part of the Court, he must get the advantage of the next open day. The day on which the Court is closed must be

treated as *dies non* and left out of consideration altogether. Even in the Roman law the maxim '*Dies continui, tempus continuum*' had its exceptions; and one of these exceptions arose in cases where the Magistrate before whom the act was to be performed was inaccessible. (Goudsmits' Pandects, p. 222.) The principle underlying the section seems to be of general application in England. In *Mayer* v. *Harding*, L. R., 2 Q. B., 410; *Mellor*, *J.*, observes as follows:—"I think it cannot be considered strictly a condition precedent where it is impossible of performance in consequence of the offices of the Court being closed, and there being no one to receive the case. This does not interfere with the principle that the parties themselves cannot extend the time by their own acts." See also *Waterton* v. *Baker*, L. R., 3 Q., B., 173. The principle laid down in the above cases has been approved of and followed by the Calcutta High Court in *Shoshee Bhusan Rudro* v. *Gobind Chunder Roy*, I. L. R., 18 C., 230, wherein it was held that it applied to cases arising under S. 174 of the Bengal Tenancy Act, VIII of 1885. Apart from the existence of any general principle, it has been held in a case arising under section 77 of the Indian Registration Act, that "section 5 is of general application notwithstanding anything contained in section 6." (*Per Tottenham, J.*, in *Nijabütoola* v. *Wazir Ali*, I. L. R., 8 C., 910.) The section has been held to be applicable to cases arising under the Bengal Rent Act, VIII of 1869, and to applications under S. 233 of the Code. (*Peary Mohun Aich* v. *Anunda Charan Biswas*, I.L.R., 18 C., 631.) The case of *Thir Singh* v. *Venkataramier*, I.L.R., 3 M., 92, is no doubt against the application of the principle to special Acts, but the reason for the decision is explained in a similar case arising under the same Act (*Reference under Forest Act*, V. of 1882, I. L. R., 10 M., 210). The explanation is that the former decision was under Act IX of 1871 in which the wording of S. 6 was very different. A distinction has to be made between days on which the Court is closed and those on which the offices of the Court are not closed. The Court may be closed, but the office may nevertheless remain open. Thus in *Motiram Raghunath* v. *Bhivraj*, I. L. R., 20 B., 745, it was held that days on which the Court is closed but the offices of the Court are open, are not holidays within the meaning of section 307 of the Code. The principle embodied in this clause has by recent legislation been declared to be appli-

cable to all cases not covered by Act XV of 1877; see section 7 of the General Clauses Act, I of 1887. Notwithstanding the enactment of this section, it has been held that when the period of six months prescribed by section 195 of the Code of Criminal Procedure, expires on a day the Court is closed, the prosecution cannot be launched on the day the Court re-opens. (*Rai Chunder Mozumdar* v. *Gour Chunder Mozumdar*, I. L. R., 22 C., 176.) The reason for the decision is that penal statutes are to be construed very strictly and in favour of the party affected thereby; and that prosecutions sanctioned under the section ought not to hang fire on a man's head for a period longer than that actually prescribed. The principle under consideration has been held not to be applicable to periods of time prescribed by the Court Fees' Act. In *re Kota*, I. L. R., 9 M., 134, it was held that when the period of 89 days prescribed for an application for review of judgment expires on a day the Court is closed, the application, if made on a day the court re-opens, must be on paper bearing the full stamp. The decision proceeds on the ground that the Court Fees' Act is a fiscal enactment, and as such, is not *in pari materia* with the Limitation Act. "Enactments *in pari materia* should be read together as if they were one law, and interpreted as consistently and harmoniously as their language will fairly admit." (*Walji Karimji* v. *Jaganath Premji*, I. L. R., 2 B., 88.) It is doubtful whether a similar decision will be arrived at, notwithstanding S. 7 of the General Clauses Act above referred to.

The second clause of this section is an enabling one, empowering the Court, on proper cause being shown, to admit appeals and applications for review of judgment, after the periods of limitation prescribed therefor. It is, as it were, a sort of proviso to section 4. Founded on no principle, it has no existence outside the Statute. This clause has been held to apply to appeals presented under S. 14 of the Madras Forest Act, V of 1882, and S. 69 of the Madras Rent Recovery Act, VIII of 1865. (*Reference under Forest Act V of* 1882, I. L. R., 10 M., 210; *Rama Row* v. *Fernand*, 2 M. L. J. Rep., 217.) In the case of applications for leave to appeal to the Privy Council, this clause has been held to have no application. The reason assigned is that the clause applies only to appeals and applications for review, and that an application for leave to appeal not being an appeal, does not come within the

purview of the clause. (*In the Matter of the Petition of Sita Ram*, I. L. R., 15 A., 14; *Thurai Rajah* v. *Jainilabdeen Rowthen*, I. L. R., 18 M., 484). In the Madras case another reason is also assigned, namely, that appeals to the Privy Council are governed by special rules laid down in Chapter XLV of the Code, which rules are not subject to the general principles of the Limitation Act. This view is based on the decision in *Viramma* v. *Abbiah*, I. L. R., 18 M., 99, to which reference will be made in dealing with S. 7. It is difficult to understand the soundness of this reason. The period of six months assigned for such appeals is that prescribed by Art. 177 of the second schedule. A similar period was provided by S. 599 of the Code, but this section has been repealed by S. 57 of Act VII of 1888. The period of limitation in such cases being therefore one prescribed by Act XV of 1877, it must be subject to the other provisions of the Act; for, S. 4 enacts that the period of limitation prescribed for suits, appeals and applications, is subject to the provisions contained in sections 5 to 25. In *Rangasayi* v. *Mahalakshmamma*, I. L. R., 14 M., 391, it has been held following the Privy Council case *Burjore & Bhawani Pershad Mussumat Bhagana*, L. R., 11 I. A., 7, that the period prescribed for furnishing security under S. 602 of the Code, can be extended for good cause shown. It is difficult to reconcile the principle on which extension can be granted in one case, with the principle on which it is refused in the other.

Section 5-A covers the same field as that covered by cl. 2 of section 5.

C. V. VISVANATHA SASTRI.

NOTES OF INDIAN CASES.

Hurri Bhusan Mukerji *v.* **Upendra Lal Mukerji**, I. L. R., 24 C., 1. The rule that a suit to set aside an adoption must be brought within six years is itself one of questionable soundness. In this case an attempt was made, but without success, to narrow the period still further by the contention that, as the validity of the adoption depended upon the genuineness of a deed of permission to adopt, the period of limitation would be three years under Articles 92 and 93 of Act XV of 1877. An adoption was first made in 1884 in pursuance of the authority to adopt, but on the death of the boy, a second adoption was made in pursuance of

the same authority in 1887. The reversioners brought a suit in 1888 to have the adoption set aside. It was held by the Privy Council that the word "*issued*" in Art. 92 was intended to refer to documents to which people commonly applied that term in business, not to instruments such as a power to adopt, and that Art. 93 was also inapplicable, as there was a special Article (118) appropriate to such suits.

Satyesh Chunder Sircar *v.* **Matangini Debi,** I. L. R., 24 C., 20. An agreement to allow an annual abatement of rent is only a variation of the terms of a lease and not a fresh lease, and does not, therefore, require registration if in writing.

Bhola Pershad *v.* **Ram Lall,** I. L. R., 24 C., 34. A suit was in this case brought by a benamidar-mortgagee and the assignees of the real mortgagee were subsequently added as plaintiffs. It was held that the suit by the benamidar could not be said to have been improperly instituted and that the Court had jurisdiction to add the assignees as plaintiffs, even though their interest might have been derived subsequent to the suit. We agree with the Calcutta High Court in thinking that it cannot be laid down as a hard and fast rule that a benamidar can under no circumstances sue in his own name. Whether a benamidar can sue or not would depend upon whether he is a trustee or a mere *alias* for the real owner. Under certain circumstances he must be looked upon as a trustee. It would be a case of trust implied by law, see Ss. 81 and 82, Trusts Act. The creation of an implied trust is not subject to the formalities prescribed for the creation of express trusts.

Purushotam Das Tribhovandas *v.* **Purushotam Das Mangaldas,** I. L. R., 21 B., 23. Candy, J., decided a novel point in this case and though we are not prepared to question the learned Judge's ruling from a strictly technical point of view, we cannot help observing that he would have acted more in accordance with the sentiments of the Hindu community if he had refused any damages to the plaintiff. The short point in the case was whether the parent of a Hindu girl who promises to give his daughter in marriage has not a valid excuse for non-performance of the contract, if the daughter refuses to marry the plaintiff, where the marriage is intended to be performed after the girl attains years of discretion. The learned Judge holds that the daughter's refusal does not justify the parent, and he proceeds on the ground that the consent of the girl is not an element in the contemplation of the parties to such an agreement, and the parent having promised to give his daughter in marriage without reference to her wishes, must pay for it if he finds himself unable to do so. Assuming that an absolute promise

of this sort would make the parent liable, we are not sure that it is in accordance with Hindu ideas to hold that a parent intended to give away his girl in marriage without consulting her when she has attained the age of discretion. We do not think that actions for breach of promise of marriage should be encouraged, and it would be well to teach intending husbands to construe such promises by parents as dependent on the consent of the would-be spouse.

Shankar *v.* Vithial, I. L. R, 21 B., 45. It is an anomaly worth removing as soon as possible that courts of the lowest class are entrusted with insolvency jurisdiction under S. 360 of the Code of Civil Procedure and are consequently converted into courts of unlimited jurisdiction. Very often the questions arising in insolvency proceedings are more intricate than in ordinary suits, which are certainly no reason for investing all courts with insolvency jurisdiction.

Sayad Hussein Mian *v.* Collector of Kaira, I. L. R., 21 B., 48. In the eyes of the Calcutta and Bombay High Courts, the earlier wisdom of the Madras High Court in *Subbayya* v. *Krishna,* I. L. R., 14 M., 186, is better than its later wisdom as embodied in *Rangasami Naickan* v. *Varadappa Naickan*, I. L. R., 17 M., 462, and we cannot but think they are right and all suits to remove trustees must be instituted under S. 539, Civil Procedure Code. We need not discuss the question again as our views have already been fully expressed in a former note, See M. L. J, 49.

SUMMARY OF RECENT CASES.

Succession Certificate—Time to produce.

Boo Beebanbibi *v.* Rahimbhai valad Jan Mohamed.

A person suing as heir of a deceased person to recover money which had not become due or payable to the deceased in his lifetime is not required to produce a certificate under Act VII of 1889.

Where the lower appellate Court raised of its own accord an issue as to whether such certificate was necessary, and deciding it against the plaintiff dismissed the suit:

Held, that it ought not to have dismissed the suit, but should have given the plaintiff time to allow of his procuring a certificate.—*Printed Judgments of the B. H. C.*

Facts admitted by both parties—Set-off.

Govind Ramchandra Desai *v.* Trimbak Vishwanath Desai.

Where a fact is affirmed by one party and admitted by the other in the pleadings, the parties are not at issue on that point, and the Court is wrong in dealing with the case as if they were, disregarding the admission.

Under S. 216 of the Code of Civil Procedure as it now stands amended, a defendant is entitled to a decree for any claim arising out of the same transaction which he could have lawfully pleaded as a set-off whether under S. 111, or otherwise.

Where, therefore, in a suit by a sharer in a khoti village against the manager thereof, to recover his share in the profits, the latter claimed to be awarded the amount paid by him as assessment and expenses of *abhavani*, &c., of the plaintiff's share:

Held, that the defendant's demand could be set-off against the plaintiff's claim.

Niaz Gul Khan v. *Durga Prasad*, I. L. R., 15 A., 9, referred to.—*Printed Judgments of the B. H. C.*

Adoption by widow—Motives to, discussion of, irrelevant.

Ramachandra Bhagwan *v.* Mulji Nanabhai.

In this Presidency in the case of a widow having the power to adopt and a religious benefit being caused to her deceased husband by the adoption, any discussion of the adopting widow's motives in making the adoption is irrelevant.—*Printed Judgments of the B. H. C.*

Sanagappa bin Amingowda *v.* Shivbasawa kom Amingowda.

Though the High Court, sitting in second appeal is not entitled to consider whether, upon the evidence before it, the lower appellate Court was correct or not upon a question of fact, yet there is no doubt that it would be acting within its jurisdiction in holding (if the fact were so) that the lower appellate Court had made a new case for the parties not warranted by the pleadings and evidence and in reversing its decree upon that ground, or that it would be within its powers in reversing the decree of an appellate Court if, without any evidence to support its finding, it reversed the decree of the Court of first instance. The former would be an error of procedure on the part of the lower appellate Court, and the latter an error of either procedure or law.—*Printed Judgments of the B. H. C.*

Defamation—Libel.

Lord William Nevill *v.* The Fine Art & General Insurance Company, Limited [1897, Appeal Cases, 68.]

In order to constitute a document a libel, it is not enough to say that by some person or another the words *might* be understood in a defamatory sense. But it should be such that it could be reasonably taken in a defamatory sense by those to whom it was published, according to the primary meaning of the language used in it.

The plaintiff acted as the defendant's agent and was carrying on the business of the agency at his own offices, 27, Charles' Street, St. James, After some time the plaintiff's agreement fell through, and the Secretary of the defendant's company sent a circular to certain persons who transacted insurance business with them through the plaintiff's office, which circular contained the following words: "The agency of Lord William Nevill at 27 Charles' Street, St. James' Square, has been closed by the Directors." The House of Lords held, confirming the decision of the Court of Appeal, that these words were not defamatory.

Maritime lien—Damages.

Currie *v.* M. Knight [1897, Appeal Cases, 97.]

It is one of the established doctrines of British Maritime Law that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. But it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches. Such an act or manœuvre will no doubt be always due to the want of skill or negligence of the persons navigating the vessel; but it is attributable to the ship, because the ship in their negligent or unskilful hands is the instrument which causes the damage.

There were three vessels moored alongside of an open quay. One of them, *the Dunlossit*, was in the centre of the tier, the steamship *Easdale* being outside her and moored to the quay by cables passing over the deck of the *Dunlossit.* A heavy gale began to rage which made the position of the vessels insecure. The *Dunlossit* was in serious peril of damage from contact with the vessels between which she lay, and her master being anxious to put to sea, and being unable to induce the master of the

Easdale to let go his moorings, cut them and sent her adrift, with the result that she went ashore and was damaged. The owner of the *Easdale* obtained a decree for damages against the owner of the *Dunlossit*. The *Dunlossit* was arrested in execution of this decree and was sold at the instance of a mortgagee of hers. A competition then arose between the owner of the *Easdale* and this mortgagee as to priority in the distribution of the sale-proceeds:

Held, by the House of Lords that there was no maritime lien created in the case and that the mortgagee had the prior claim to the price.

Nuisance—Street obstruction—Town Council.

Ogston v. Aberdeen District Tramways Company [1897, Appeal Cases, 111.]

A Tramway Company after a heavy snowstorm cleaned their track by means of a snow plough, and thereby increased the deposit of snow in certain portions of the street, and, in order to prevent the snow or snow water from freezing in the grooves, they scattered salt upon the rails and in their vicinity. The snow and salt in combination formed a wet briny amalgam, and the slush thus formed was left to remain in the street without being removed then and there. The result was that the briny slush permeated a large portion of the street and caused good deal of injury to horses standing or moving there:

Held by the House of Lords, that these acts of the Tramway Company amounted to an unauthorized nuisance, and that they were responsible for it, notwithstanding the fact that the duty of removing any obstructions in the street rested with the Town Council as the street authority.

Per. Lord Watson—"The nuisance is ultimately and mainly due to the employment of salt, which is used by them and not by the Town Council. If they chose to employ means which, if certain precautions are not observed, will lead to a nuisance, they must first insure that these precautions will be taken. The Town Council are under no obligation, statutory or otherwise, to counteract the illegal proceedings of the respondents."

Stream—Water percolating underground.

McNab v. Robertson, and others [1897, Appeal Cases, 129.]

The word "stream" in its natural and primary sense denotes a body of water having, as such body, a defined and continuous flow in one direc-

tion, whether this be underneath the ground or on the surface of the earth. But water, whether falling from the sky or escaping from a spring which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through these strata, until it issues therefrom at a lower level through dislocation of the strata or otherwise, cannot be described as a "stream."

A lessor demised by lease a distillery, cottages and thirteen-and-a-half acres of land, with two ponds within the demised area together with the right to the water in the said ponds and in the streams leading thereto. There was a spring which rose at a distance from the demised area and which on its way towards one of the ponds lost itself in a marsh just outside the demised subjects and percolated through the marshy ground into one of the ponds. The lessor sunk a tank in the marsh, drew off thence the percolating water which would otherwise have found its way eventually into the pond :

Held, by the House of Lords (Lord Halsbury, L. C., dissenting) that the water thus drawn off by the lessor was not water in any stream leading to the pond. The Lord Chancellor, however, held that the word "streams" in the lease included as between the lessor and the lessee all the sources of supply of the ponds. He said : "So far as one can get any light from the nature of the thing, the subject-matter with which the parties were dealing, it appears that what the grantor intended to convey to the grantee, and what the grantee, who was a distiller, was getting, was every source of supply which it was possible to get by general words."

In answer to the contention that the lessor was under an implied contractual obligation to allow as much of the water of the unlet sources from which the pond was fed to continue to enter it so as not to diminish the average supply which the ponds were receiving at the date of the lease, Lord Watson said : "But any such implication is attended with difficulty in cases like the present, where certain sources of supply are specified and let. I am not prepared to affirm that a contract to the effect pleaded is implied."

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications :—

The Educational Review for February 1897 (*in exchange*).
Green Bag for February 1897 (*in exchange*).
Allahabad Weekly Notes for February 1897 (*in exchange*).
The Canadian Law Times for February 1897 (*in exchange*).
The Albany Law Journal for February 1897 (*in exchange*).
Harvard Law Review for February 1897 (*in exchange*).

The Ambassador's Parrot.—We gather from the "Law Notes," London, the material facts of a serious international crisis. A parrot escaped from the Japanese Embassy in Berlin and alighted in a tree in an adjacent garden. To dislodge the parrot the attachés of the Embassy used a garden hose from the wall of the Japanese dominions and incidentally drenched Herr Fleckinhaus, the owner of the garden, who was under the tree. The parrot did not come off the perch, but in a mournful voice kept saying, "Regenwetter, immer regenwetter." On Herr Fleckinhaus, however, the wet blanket did not have an effect so subduing. "Mad as a wet hen" he rushed to action; and it was an action for trespass brought in the Schöppengericht. An attempt was made to defeat German jurisdiction on account of the extraterritorial character of the embassy, but this failed, and the invasion of Germany by water was punished by judgment for damages.—*Case and Comment.*

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Dissatisfied with the Pony.—The opinion of Judge Wilkes in a late Tennesse case describes a tragedy and its consequences ;—It was a suit on a note for a Texas pony described as "a small pony mare, well formed, with bright eyes and a remarkably active pair of heels." It appeared that on making the trade, defendant was in the act of leading the pony away with an ordinary halter "when the plaintiff suggested that a 'slip halter' would suit the temperament and disposition of the animal better," and advised defendant "not to turn her loose or put her into a stable, but to tie her to a post until she was gentle." Strictly following directions, defendant next morning "came around to see if the pony was making any progress toward getting gentle and found her very quiet,—in fact she was dead. He says that he does not certainly know what caused her death, but thinks it was because 'she could not get her breath.' This seems quiet probable, as the 'slip halter' was found to have 'slipped' down and become tightened around her nostrils." The defendant claimed that "he only took the pony on

'probation' for six months and by the contract had the right, at any time he was dissatisfied, to rescind the trade and deliver up the pony," and that while he did not offer to return the pony because he was prevented "by the act of God," "that when he saw that the pony had committed suicide he did not care to keep her any longer, and he therefore exercised his option to rescind the trade." Plaintiff insisted that it was the "act of the pony" which prevented the return, but the defence was held good, and the Court said :- "We think the weight of the proof was that the defendant was to have the right to rescind the trade at any time within six months, if he became displeased with his bargain, and, having exercised his option, we cannot say that he acted arbitrarily in becoming displeased after the pony had put an end to her further usefulness by means of the device furnished by the plaintiff."—*Case and Comment.*

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We take the liberty of reprinting the following article from the Law Magazine and Review :—

The right of counsel to be instructed by lay clients.

At this epoch of history, the close of the Nineteenth Century, by means of a very determined influence exercised by the seniors of the Bar, the average junior barrister has been taught to believe and now as a rule holds it as part of his creed, that he may not be instructed as counsel for a lay client without the intervention of an intermediary—solicitor or attorney. It is obvious that to a senior barrister doing a large practice, it is most beneficent to observe in all its fulness the so-called obligation of having another man—call him attorney, solicitor, procurator, agent, scrivener or whatever else you like—who will do the inferior work, that is to say, the work of taking the instructions of the lay client for him, separating the wheat from the chaff, and finally bringing the case, bereft of all unnecessary appendages, to him, the barrister, for the benefit of his learned opinion, or for fight in the Forum. All this, be it remembered, being to the disadvantage of the junior barrister, who might obtain several of the lesser cases, now brought to his more fortunate brother, were that brother more hampered by doing all the inferior work of cases himself, instead of having another man—the intermediary—to do that work for him.

In the middle part of this century, however, the abovementioned superstition, of the necessity of the employment of an intermediary, met with a well deserved check at the hands of the Court of Queen's Bench, presided over by Lord Campbell, the Chief Justice.

The facts were these. Mr. Justice Patteson, at the Spring Assizes, 1846, for the County of Gloucester, tried a cause of ejectment in which the defendant appeared and pleaded in person; the case being *Doe d. Bennett* v. *Hale.* Mr. A. Newton, a barrister, appeared as counsel for the defendant, cross-examined the witnesses, and was about to address the jury on behalf of the defendant when the learned Judge inquired of him whether he was instructed by any attorney. Mr. Newton answered in the negative. The Judge thereupon refused to permit him to address the jury, stating that he should confine him to arguing any point of law which might arise. Fortunately for the history of the Bar, although unfortunately for the then defendant, the jury found a verdict for the plaintiff. In Easter Term, 1850, a Rule *Nisi* had been obtained for a new trial of this cause on the ground that the defendant ought to have been allowed to address the jury by his counsel. Mr. Keating shewed cause against the Rule, arguing that the rule of Common Law was the same in civil as in criminal proceedings, *i.e.*, that a party could only appear in person, that this rule was first altered by the statute of Westminster II. (13 Edw. I., c. 10) which allowed parties to make general attorneys; but after that time the analogy between civil and criminal proceedings ceased, for a prisoner could not be defended by counsel. The party must have advocated his own cause to the jury, the counsel only assisted in arguing points of law. He also referred to 2 Hen. VII., c. 19, authorizing plaintiffs to sue *in formâ pauperis,* which does not allow of a party calling upon a counsel to act except through the intervention of an attorney, for it expressly gives the pauper the services of an attorney as well as of counsel gratuitously. He also referred to the then County Courts Act (9 & 10 Vict., c. 95), by sect. 91 of which it was provided that a barrister in a County Court must be instructed by an attorney. He admitted, however, that in criminal trials a prisoner had always been allowed to have himself defended by counsel, without the intervention of an attorney.

Mr. A. Newton, in support of the Rule, argued that the practice in criminal matters was conclusive, for the only question was whether there be any rule of law prohibiting a counsel from appearing without an attorney. A counsel might appear without a fee, for that was a matter entirely for his own consideration. It is not optional with a counsel to receive a brief, or not, if offered. The etiquette of the Bar alone could be relied on to prevent fees, less than those sanctioned by usage, being taken. In Equity Courts it is understood that the practice exists of taking briefs without the intervention of a solicitor, why then should not the same liberty prevail at Law? In the House of Lords it

is the practice to allow persons who are not attorneys to conduct the business, there being an express Order that the parties be heard by themselves, their counsel, attorneys, or *agents.* In the Privy Council the practice is to allow others to conduct appeals besides the party or his proctor.

Judgment was delivered by Lord Campbell, Chief Justice, on behalf of the Court. The names of the Judges who sat during the Easter Term were, besides the Chief Justice, Mr. Justice Patteson, Mr. Justice Wightman, and Mr. Justice Erle. They were probably all present. The judgment was as follows:—

"In this case we are called upon to consider whether in the Superior Courts there be a rule of law which prevents a defendant in a Civil suit, who has appeared to the process in person, from having in the stages of the suit in which counsel, if regularly instructed by an attorney, might assist him, the assistance of counsel instructed by himself without an attorney. There certainly has been an understanding in the profession that a barrister ought not to accept a brief in a Civil suit except from an attorney; and I believe that it is for the benefit of the suitors and for the satisfactory administration of justice that this understanding should be generally acted upon; but we are of opinion that there is no rule of law by which it can be enforced. The only statutable provision upon the subject is by the late County Courts Act (9 & 10 Vict., c. 95, s. 91), which enacts that a barrister shall not be entitled to appear in any of the said Courts unless he be instructed by an attorney. The statute of Westminster I., allowing an appearance by attorney, the statute 7 Will. III., c. 3, allowing in cases of treason a full defence by two counsel, and the statute 6 & 7 Will. IV., c. 114, allowing a full defence by counsel in all cases of felony, are silent as to the manner in which counsel are to be instructed. This being a matter of procedure, the Judges, of their own authority, might, according to their view of what was fit, have laid down a general rule determining under what conditions and restrictions barristers should be permitted to plead and have pre-audience before them, but no such Rule is to be found. The alleged restriction, therefore, must depend upon usage, from which it might be inferred that such a rule had been promulgated, although not now extant in writing. In Criminal Courts, it is conceded that the practice for a barrister not to plead unless instructed by an attorney, does not prevail, and we all know instances in which, with the sanction and at the suggestion of Judges, barristers have defended prisoners without the intervention of an attorney.

"There would be a great difficulty in drawing a strict distinction for this purpose between Civil and Criminal proceedings, and between Civil and Criminal Courts. The obligation upon the owner of land to repair a highway may be tried upon an indictment; and a man may be charged with an offence in the shape of an action to recover a penalty. On the Circuit, we familiarly talk of the Crown side and of the Civil side; but questions respecting insolvent debtors used to be discussed and determined in the Crown Court, and at Nisi Prius there are tried not only cases of *mandamus* and *quo warranto*, but criminal informations and indictments for mis-

demeanours. Even an indictment for the crime of murder may be removed into this Court by *certiorari*, and tried at Nisi Prius.

"In strictly Civil suits the usage has not been invariably uniform, as we must presume it would have been, had it been regulated by a law which as propounded admits of no exceptions. Instances have been mentioned to us in which counsel of great eminence and high honour have thought that from peculiar circumstances they were justified, with or without a fee, in holding a brief delivered to them by the party without any attorney being employed. There is no decided case which can assist us, for in *The King* v. *Sir Francis Burdett*, and *Moscati* v. *Lawson* (7 Car. & P. 32), the question was not respecting the intervention of an attorney, but whether if a party conducts the trial himself as his own counsel, he may likewise have the assistance of counsel to argue questions of law, and to examine witnesses. If immemorial usage be relied upon, we must remember that sergeants-countors and other counsel existed in England long before the time of Edward I., and there seems every reason to believe that they communicated directly with the parties. Chaucer speaks of—

> "'A serjeant-at-law wary and wise
> That oft had been at the Parvise.'

"The Parvise is well known to have been a sort of exchange at St. Paul's, where all ranks met to do business, and the serjeants-at-law, like Roman patrons, gave advice to all that came to consult them. Afterwards, each serjeant-at-law had a pillar in the Cathedral assigned to him, where he stood and communicated with his clients. The advantage to be derived from sub-dividing the business of conducting a suit, and having two orders in the profession of the law between whom it should be distributed, became more and more felt; but for a long time the attorney only sued out process, and did what was necessary in the offices of the Court for bringing the cause to trial and for having execution on the judgment. I highly approve of the demarcation finally drawn between the functions of the attorney and those of the counsel, and I believe that the intervention of the attorney between the counsel and the party has greatly contributed, not only to the dignity of the Bar, but to the improvement of English jurisprudence. I revert to the practice of former ages only for the purpose of shewing that the onus here does not lie upon the defendant to vouch an Act of Parliament, or rule of Court, or decision to support the privilege which he claims.

"I am by no means insensible of the inconvenience which may arise from this privilege being judicially recognized. But I do earnestly trust it will not alter the almost uniform usage which has prevailed upon the subject for more than a century, and that the interference of the Judges to rectify any abuse of it will not be necessary. Exceptional cases may again occur, though very rarely, when it may be fit for barristers to plead in Civil suits instructed only by the parties, but they may continue generally to adhere to what has been considered the etiquette of the Bar, for although ever ready to render their best assistance for the discovery of truth and the vindication of right, they are at liberty, under the control of the Courts, to lay down conditions upon which, for the public good, their services are to be obtained.

"Nor can that highly honourable and useful branch of the profession, the attorneys, be prejudiced by this decision, for it would be penal for any class of men to

perform any of the functions which properly belong to an attorney; and their intermediary agency between the parties and the counsel, so conducive to the due administration of justice, will, I hope, remain unimpaired. At any rate, we can at present only look to see how the law is, leaving any inconvenience which may be produced by it to be remedied by the authority of the Judges or of the legislature.

"Upon the whole, we are of opinion that the Rule for a new trial ought to be made absolute."

The Rule therefore was made absolute.* It should also be mentioned that, in the course of the arguments, Mr. Justice Erle explained that "counsel" formerly meant a friend retained to conduct the suit, adding that "perhaps he only escaped the penalties of maintenance by being paid for his services."

It is interesting to notice that sect. 91 of the County Courts Act, mentioned in the above judgment, which prohibited a barrister from appearing in a County Court unless instructed by an attorney, was repealed by sect. 10 of 15 & 16 Vict. at the instance of the late Lord Brougham, and it is thereby enacted that "a barrister *retained by* or on behalf of *the party* on either side" may address the Court, subject to such regulations as the Judge may from time to time prescribe for the orderly transaction of the business of the Court. And this Rule has been continued in County Court Acts to the present day.

Mr. Serjeant Manning has written the following note on the above case of *Doe d Bennett* v. *Hale* :—

"Before the statute of Westminster II. (1 stat. 13 E. 1), c. 10 plaintiffs and defendants were bound to appear in person unless authorized, by the King's writ of *dedimus potestatem de attornato faciendo*, to substitute an attorney. Once before the Court they were at liberty to avail themselves of the assistance of a countor (pleader) who might stand by them, advise with them, and speak for them. In the King's Court of Common Law, though it was otherwise in the Ecclesiastical Courts, the countor could only be a person of a particular class, selected by the Crown *ad serviendum ad legem*, in administering justice as judges of the Courts of King's Bench and Common Pleas, and as justices of assize: or, when not so employed by the Crown, in assisting those suitors who were too ignorant of the law or too little acquainted with the (*French*) language in which the proceedings were carried on, to conduct their own cases.

"But, when a general power to appear by attorney, had in 1285, been given by stat. Westminster II. (1 stat. 13 E. 1), c. 10, and all persons were at liberty to appoint either *general* attorneys or attorneys *ad lucrandum vel perdendum* in a particular cause, it was thought expedient to restrict the appointment to persons presumed to be acquainted with the common law. The course of preparation for the degree of the coif was:—first, to pass sometime in an inn of chancery, then to enter at an inn

* 15 Q.B. (Adolp. & Ell., New Series) 171; *s.c.* 19 L.J. (Q.B.) 353.

of court, and then to proceed through the degrees of inner barrister and outer barrister to that of apprentice at law, from which latter class the serjeants were chosen.

"The serjeants were bound to attend the sittings of the *Magnus Bancus* (the Court of Common Pleas); and, as that Court had become stationary, whilst the Chancery, the King's Bench and the Exchequer still followed the person of the King, it was considered desirable that these Courts should have the assistance of advocates who had not yet been called upon to take the degree of the coif. A measure was resorted to for providing for both these wants. An order was made in Parliament in 1292 (1 *Rot Parl.* 84 *b.*), entituled '*de attornatis et apprenticiis,*' by which the justices of the Common Pleas were required to appoint a certain number *de quolibet comitatu, de melioribus et legalioribus et libentius addiscentibus,* to attend the Courts, great complaints having been made in Parliament of causes being lost for want of serjeants (*par defaute de serjeantie*); 1 Rot. Parl. 4 a; 2 Rot. Parl. 140 a, b; *Mann. Serviens ad Legem,* 268. From this period, apprentices at law enjoyed the double privilege of appearing as attorneys for suitors in all the common law Courts, and of acting as advocates in those Courts in which serjeants did not regularly attend. Thus, in the 11 Ed. III. (2 Rot. Parl. 96 b; *Mann. Serv. ad Legem,* 188), *John de Codyngton,* an apprentice and attorney, was discharged by the council from a command of the Lord Admiral to appear at *Orewell* armed and apparelled as a man at arms. Afterwards persons were admitted to practise as attorneys who had not taken the degree of apprentice at law; and utter barristers were allowed to appear as advocates in the itinerant Courts without qualifying themselves to act as attorneys, within the Order of 1292, by taking the degree of apprentice. Of late years students (inner barristers), being certified special pleaders, have been allowed to act as advocates at the Judge's chambers.

"At common law, the serjeant could seldom receive his instructions through an attorney; and, after the making of the Order of 1292, although in the Common Pleas a serjeant might be instructed by an attorney, yet in other Courts the apprentice attorney would have no one to instruct but himself, until the separation of the two functions, which now generally prevails, had taken place; a separation which does, however, exist in the proceedings of many Inferior Courts, and which has been discontinued in the case of the Crown, the King's Attorney-General no longer instructing and assisting the King's serjeants, but conducting the King's business himself."

Sir Patrick Co'quhoun, writing about the same date (1854) as the above judgment of Lord Campbell, says ("Roman Civil Law," Vol. iii., p. 317) :—"One of the *advocati* who were accustomed to frequent the Forum in more recent times, was usually requested to demand the action for the actor; but it is probable that at an earlier period the client first applied to his patron, in order to obtain his opinion on the case, and to secure his services in the suit, which would in England be called 'retaining counsel.' It was, however, the custom in Rome, for the patrons to pace up and down the Forum during the period at which the Court

sat, which was four o'clock by the Roman, equivalent to about nine o'clock of our computation:—

> "Ventum erat ad Vestæ *quarta* jam *parte diei,*
> Præterita; et casu tunc respondere vadato
> Debebat, quod ni fecisset perdere litem,*

in order to be consulted by their clients, and such others as required their aid and advice.

"In like manner, the serjeants used to assemble in St. Paul's to be consulted by their clients in the City of London; and even at the present time a pillar in the Cathedral is assigned to a serjeant on his creation; for the very convenient practice of retaining counsel through the intervention of attorneys *is of a comparatively modern date*—perhaps of not more than one hundred years back—since formerly no one was allowed to employ an attorney or agent who could appear in person, and then only by leave of the Court; a trace of this practice is observable in the 'calling the plaintiff,' in cases of nonsuit. . . . . Although the intervention of an agent is in a great number of cases unnecessary, it is judged inconvenient to depart from the general rule in particular instances; hence the etiquette of the superior branch of the legal profession admits but three exceptions; when the client wishes to consult counsel upon the conduct of his attorney, because it is not judged advisable that another attorney should intervene in so delicate an affair; in the case of the drawing up of wills, because the client may wish to confide his future intentions to as few persons as possible; and in the case of the defence of persons under indictment for criminal offences because, being for the most part indigent persons, it is not considered just to expose them to the additional expense of employing an attorney. The same reasons are probably applicable to cases in the Inferior Court, but this has as yet hardly become a settled practice."

The reader will notice that at the time when the abovementioned judgment was delivered, and when Sir Patrick Colquhoun wrote, the intervention of an attorney or agent was by no means fully recognized; the practice of this intervention had been struggling for an existence for about a hundred years before that time, and was looked upon rather as a *convenience* than as an *obligation.* Sir Patrick Colquhoun, whilst adopting the extreme view of the desirability of the intervention, is nevertheless forced to admit that there are three important cases in which such intervention cannot be tolerated; and he further admits

* Hor. *Sat.* I., 9, Verse 35.

that the practice of intervention is comparatively speaking new, and unsupported by any legal enactment.

Mr. Serjeant Pulling ("Order of the Coif," p. 2) says: "The Brothers of the Coif (serjeants) devoted to the profession of the law, bound by a solemn oath to give counsel and legal aid to the King's people, were for ages to be found at their ancient rendezvous in St. Paul's Cathedral, the *Parvis*, or their allotted pillar there, wearing their distinctive costume, the robe and the coif, ever ready to receive those who sought their assistance, to give counsel *pur son donant* to the rich, and gratis to the poor suitor, and to aid when called on in the judicial business of the King's courts." And again (p. 160), "the Round of the Temple Church like the *Parvis* of St. Paul's was for ages professionally resorted to and used both by students and practitioners of the law." These legal meetings are referred to by Ben Jonson in the "Alchemist," and by Samuel Butler in "Hudibras," part 3, c. 3. Other instances could doubtless be found with a little research,

And such is the law at the present day. Barristers, *i. e.*, apprentices of the law, have succeeded to the privileges of the serjeants, but the powers of the Bar have not been restrained by any statute. They are the same now as they ever were. And although it may be urged that it is convenient for the rich suitor to have the use of the intermediary, to act as his agent, and for counsel in large practice to have the intermediary to perform the less dignified work for them, so as to render their own work shorter with regard to each case, and thereby to enable them to accept a larger number of cases and a proportionately larger number of fees, yet it should not be forgotten that many suitors are very poor, and that it is a matter of no little moment to them to be able to carry on a lawsuit, a prosecution, or a defence, without the expense of an intermediary. This the law allows them to do; this the law permits barristers to undertake. Without disparaging the utility of attorneys, or solicitors, and their bills of costs, it nevertheless is desirable that the superstition of the necessity of employing an intermediary should be removed, and that the Bar—especially the junior Bar—should be fully cognizant of their rights. The fusion of the duties of barrister, attorney, solicitor, and notary public in one person, in many of our colonies and in the United States, testifies largely to the opinion of those of our own kith and kin as to the undesirability of the employment of intermediaries. What would be said if a medical man could alone be approached by his patient through a chemist and druggist? or a clergyman through the parish clerk?

JUNIUS.

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THE VACANT ADVOCATE-GENERALSHIP.

I

The death of Mr. Spring Branson has rendered vacant an office which is the prize of the legal profession in Madras. The Advocate-General is the chief law officer of the Government of the Province. The office carries with it a salary of Rs. 1,800 per mensem with liberty to engage in private practice and the position of head of an important branch of the legal profession in Madras. When Mr. Branson took leave a few months ago in consequence of the illness which has since terminated fatally, an agitation sprang up in Madras on the part of the barristers practising here in regard to the appointment of a successor. When it was rumoured that the Government of Sir Arthur Havelock had it in contemplation to confer the officiating appointment upon a vakil, there was a considerable flutter in the ranks of barristers which is believed to have spread even to the ranks of our High Court Judges. The appointment was made. The Government found a competent person in the Honorable Mr. V. Bhashyam Aiyangar. Opinion was unanimous that the Government had selected a person pre-eminently fit for the office. Not even those who were eager to denounce the appointment as "illegal, inconvenient and injudicious" could breathe a syllable against the high qualifications of the Government nominee. It was practically conceded on all hands that he was the ablest lawyer at the bar in Madras; that he was in fact head and shoulders above every other aspirant for the office. Whether it is a question of Hindu Law or of English Mercantile Law, whether it is a point relating to the Law of Obligations or arising in the region of Private International Law, by his grasp of principles, his ready perception of legal analogies and his faculty of acute ratiocination he has achieved a solid reputation as the virtual leader of the Madras bar for many years. No

exception could therefore be taken on personal grounds. As the Government was entitled to the services of the best legal adviser, their choice of Mr. Bhashyam Aiyangar could not be cavilled at. Government could not afford to be content with an indifferent article. The chief function of the Advocate-General is to help the Government with advice; and the Government is bound to see in the interests of the country that the person selected is the most capable lawyer. In the Legislative Council whose recent expansion has led to a critical examination of Government measures by lawyers of ability whom the constituencies have deputed, Government has found the need for a thoroughly reliable and capable law officer. In the transaction of the business of the various departments under it, which is daily assuming more and more complex proportions, questions of difficulty have to be solved for which the assistance of an able law officer is indispensable. Nobody can therefore quarrel with the Government for being guided in its selection by no consideration of race or class interest.

It was said that the appointment was illegal, though nobody appears to have seriously believed in such a view. Light appears to have been sought for from Calcutta, but it only opened the eyes of the seekers to their own ignorance. The question of the legality of the appointment was reserved for a suitable opportunity, but when it was raised, the Judge pronounced it to be clearly legal. We have ourselves shown at considerable length that no special qualifications were prescribed by statute for the Advocate-General and that the Government were at liberty to choose a competent person. There has been some talk, not altogether wise, that by custom which has the force of law, the Advocate-General should only be a barrister. Such a statement does not deserve serious consideration; and one can only wonder at the desperate straits to which the opponents to the appointment are reduced, that they should raise objections which no person pretending to any legal attainments can with any safety to his reputation urge. S. 30 of 21 and 22 Vic., ch. 106, speaks of appointments which by regulation, custom or usage were being made by the Local Governments in India and empowers the authorities to make such appointments in the future as well. The custom here referred to is with reference to the appointing authority and has no reference to the qualifications of the person to be appointed. Indeed, it would be absurd

that a custom should be referred to as regards the qualifications of the Officiating Advocate-General, an appointment falling within S. 30, while S. 29, which speaks of the permanent appointment makes no allusion to any custom. We may next ask, is the custom ancient? The office of Advocate-General itself does not appear to be older than the latter half of the last century. Is it uniform? Then the question arises, whether the custom is to appoint a barrister of England or of Ireland or an advocate of the faculty of advocates in Scotland or an advocate of the Supreme Court not being a barrister. It is a fact that a Lieutenant in the Army and a Dragoon enrolled as Advocates of the Supreme Court have held the office of Advocate-General. We wonder why we are not told that tho Advocate-General is by custom fully six feet and that nobody can legally be appointed who is only five feet nine inches. The argument is so ridiculous that it seems idle to waste any further time upon it. It may well be that the Government hitherto succeeded in finding the most competent person for the office in the ranks of advocates, but the day has come when such an expectation cannot be always realized.

The death of Mr. Spring Branson will probably give rise to a renewal of the agitation which sprang up at the time of the announcement of his leave. The scene will probably be transferred to London as the permanent appointment rests with the Queen, or, virtually, the Secretary of State for India. It seems to us that he ought to have no difficulty in deciding the question, for the recommendation of the Local Government will be clear. It is generally understood that the Governor and his Council were unanimous in the selection of Mr. Bhashyam Aiyangar; and every argument that can be seriously adduced upon the subject is in favour of his permanent appointment. The Advocate-General in India has by virtue of his office various functions to discharge. With reference to the proper administration of charities, the Advocate-General *ex-officio* is entitled to institute a suit for the appointment of trustees or for the settlement of a scheme. Trusts, religious and charitable, are most numerous in this country among Hindus and Muhammadans. The Government has, in accordance with the policy of religious nuetrality, had to abstain from interference with the management of these trusts. Under these circumstances it is higly desirable that a native of India well

acquainted with the usages of religious institutions and charitable foundations should fill the office of Advocate-General which *ex-officio* entitles him to intervene, and no European, however well acquainted he may be with the laws of the land, can perform this function with any degree of efficiency.

It is again to be remembered that there is a large and growing body of legal practitioners enrolled as vakils of the High Court under rules framed in accordance with the power conferred by the Letters Patent, not to speak of the still more numerous body of first and second grade pleaders spread over the whole country. That this large body with no Inns of Court to exercise any disciplinary jurisdiction to enforce professional etiquette and good conduct should have a head to whom they could look up for counsel and guidance is reasonable and proper. There are shades of professional misconduct or breach of professional etiquette or impropriety of behaviour which cannot come under the cognizance of the courts of justice, nor even if they did, could they be checked and proper conduct enforced. The opinion of brother practitioners, the authority and example of a head who must be esteemed in all the ranks of the profession will do far more to enforce rectitude of conduct than the fear of a public exposure of grave delinquencies in a court. It goes without saying that a practitioner commanding the respect and possessing the confidence of Government and carrying the prestige attached to the position of chief law officer of the Government selected for his great talents and high attainments and position as leader of the bar, will be a source of immense influence for good which will permeate the ranks of the whole profession.

It is objected that the handful of barristers practising in Madras, not exceeding twenty in number, of whom not a dozen are of European birth will, if a vakil be appointed to the office of Advocate-General, lose an important medium of communication with the Inns of Court. We have already pointed out that a barrister of Ireland or an advocate of Scotland cannot be such a medium of communication; nor is it apparent why if a medium were necessary, the medium should be provided with an appointment at the cost of the State, or why one of their own body should not be chosen as president to be the channel of communication on points of etiquette

or professional discipline, or why the Government Pleader, who is in Madras a barrister, should not transmit to the Benchers the grievances of individual members in a case of breach of professional etiquette. Again, it may be asked, why should not the disciplinary jurisdiction possessed by the High Court be invoked in case a question of importance is raised for settlement. The argument based upon the relation of the Inns of Courts with the handful of local barristers appears to us to be altogether fanciful.

The Government as the dispenser of patronage ought to bear in mind that there is another standpoint from which the appointment of Mr. Bhashyam Aiyangar may be looked upon as highly desirable. There are half a dozen crown offices at the disposal of Government, every one of which is held by a barrister. The office of Administrator-General is the only one among them which requires of the holder the qualification that he should be a barrister. None of the other offices is the exclusive privilege of barristers. Yet the Official Trustee is a barrister. The Government Pleader is another. A barrister holds the offices of Clerk of the Crown and Official Assignee. The Crown Prosecutor is a barrister. And a barrister holds the office of Law Reporter. With the exception of three, all the rest of the European barristers hold one crown office or another. And because one of these offices is proposed to be given to a native of India who is a vakil, admittedly holding the highest position at the bar, a storm of indignation is raised and wild suggestions are made that the appointment is illegal and inconvenient and injudicious. The Government may well consider that the large body of vakils should not be ignored and left in the cold. They have responsibilities in the administration of a country of varied and conflicting interests which the narrow selfishness of a handful of barristers cannot realize.

In answer to a question as to why a native of India should not be appointed to a seat in the India Council, Lord George Hamilton is reported to have said that he could not find one possessing sufficient administrative experience to fill the place. We feel that he cannot with any justice or consistency ignore the claims of Mr. Bhashyam Aiyangar for the office of Advocate-General. It will be a fitting act of grace on the part of Her Majesty that the year of her Diamond Jubilee should witness a further vindication of Her

gracious Proclamation of 1858 that in the distribution of patronage there shall be no difference of race, creed or colour.

II

The Advocate-General in India is in his province the first law officer of the Crown and as such has enjoyed precedence and pre-audience. The Sovereign is the fountain of all honors, and the law officer with the Queen's patent of precedence is entitled to pre-audience in Her Majesty's Courts. Such patents used to be granted to the Advocates-General of the Company before the transference of the Company's territories to the Crown. But the law officers of the Company have become the law officers of the Crown after the enactment of the statute 21 and 22 Vict, ch. 106. Although no patents of precedence are issued now-a-days, the Advocate-General as chief law officer of the Crown is entitled to the same precedence as he formerly enjoyed by virtue of his patent of precedence. The Officiating Advocate-General appointed by the Local Government under the provisions of S. 30 of 21 and 22 Vict, ch. 106, is entitled to the same precedence as the permanent Advocate-General as he is likewise the first law officer of the Crown. As the Sovereign dispenses justice through her courts, it stands to reason that her counsel should enjoy the right of pre-audience, no matter whether on the particular occasion they appear to plead her cause or the interests of a private suitor.

We have shown in a former article that there is no statutory qualification for the holder of the office of Advocate-General, and Her Majesty may appoint such person as she thinks fit for the office.

There are different orders of practitioners qualified to appear and plead, attached to the several High Courts, advocates and vakils who belong to two different branches. Advocates enjoy the right of pre-audience in Bombay and Allahabad by virtue of the rules framed by the respective High Courts. The question of pre-audience as between advocate and vakil was raised in Calcutta and decided in favour of the advocate by Sir Barnes Peacock. See 10 Sev's Report, p. 39. In Madras the question does not appear to have been raised, nor is there any rule upon the subject. But as a matter of fact the advocate has been treated as having a right of pre-audience. But this right of pre-audience of the advocate

enjoyed as a matter of practice cannot affect the right of the Advocate-General to that pre-audience which he is entitled to by virtue of his position as chief law officer of the Crown, no matter whether he is an advocate, vakil or attorney. The right of pre-audience of the advocate is not a statutory privilege and his right of pre-audience which is a mere matter of etiquette must yield to that of the chief law officer of the Crown before Her Majesty's Courts.

This view appears to derive considerable support from the history of the conflict in England between the Attorney-General who was not a serjeant and the serjeants entitled to the privilege of exclusive audience before the Court of Common Pleas. In England there was another branch of practitioners called advocates of the College of Advocates at Doctors' Commons practising in the Admiralty and Ecclesiastical Courts. Before the High Court of delegates and at the bar of the Privy Council, the advocates and barristers both had right of audience. An advocate took precedence of an ordinary barrister. We do not hear of the advocates now and the office of Advocate-General has practically become extinct, because it has not been filled up since the resignation of Sir Travers Twiss in 1872. (See Encyclopædia of the Laws of England-Title-Advocate-General). The order of serjeants also has nearly died out. In the Court of Common Pleas, serjeants had formerly the right of exclusive audience, and although it was decided in *Paddock* v. *Forester*, 8 Dowling 834, that the Attorney-General who was no serjeant had a right of audience in a cause in which the Crown was interested and the general body of barristers was denied the right, 6 Bingham's New Cases p. 235, this exclusive right of the serjeants continued until it was provided by the statute 9 and 10 Vict. ch. 54, that all barristers according to their rank and seniority should have equal right of practising, pleading and audience in the Common Pleas together with the serjeants, 3 Stephen's Commentaries p. 85. Although as a barrister merely he would have no right of audience at all before the Court of Common Pleas, yet as law officer of the Crown, the Attorney-General had this right and pre-audience also before the Court of Common Pleas.

Although, therefore, the order of barristers in England was regarded as inferior to that of the serjeants and that of advocates at one time, the Attorney-General as the principal law officer in

Westminister Hall was acceded audience before courts where the order of barristers had not the right and precedence over the members of the higher order. Arguing from analogy we are inclined to think that the Advocate-General in India is similarly entitled to precedence, though he may be a member of a lower order than barristers. The position of the Advocate-General has been compared to that of the Attorney-General in England by 35 Geo. III, ch. 155, S. 111, and by the Indian Act X of 1875, S. 144. And we have already pointed out that the Officiating Advocate-General stands in the same position. (See Bourke's Reports, pp. 226 and 227.)

Among the law officers of the Crown, the Attorney-General who was the head of the lower order of barristers held a position below others who were at the head of the higher orders of serjeants and advocates, such as the King's Ancient Serjeant and the King's Premier Serjeant and the Kings Advocate or Advocate-General. Before the same court, the Advocate-General took precedence in like manner of the Attorney-General and Solicitor-General. *Barton*, v. *R.*, 2 Moore's Privy Council 29; *Dyke* v. *Walford* 5 Moore's Privy Council, 447, *Harrison v. R.*, 10 Moore's Privy Council, 201. The Crown directed in 1862 that the Attorney-General and Solicitor General should take precedence in future of the Queen's Advocate. Blackstone gives a table of precedence at the bar which begins thus: 1, The King's Premier Serjeant; 2, The King's Ancient Sergeant; 3, The King's Advocate-General; 4, The King's Attorney-General; 5, The King's Solicitor-General. 3, Blackstone, p. 28. By a Royal Order of 1814 (See 6 Taunton, p. 424) the Attorney-General and Solicitor-General were declared to have precedence before the King's Serjeants. This appears to us to furnish a close parallel to that of a Vakil Advocate-General who, though as vakil, he may not be entitled to precedence, is still entitled to it by virtue of his position as first law officer of the Crown. A similar question arose with reference to the Tubman and Postman, the holders of two offices created by the Court of Exchequer who had precedence in motions. But the Court accorded it to the Attorney-General in a Crown case. *R.* v. *Bishop of Exeter*, 7 Meeson and Welsby, 188, and Stephen's Commentaries, Vol. III, p. 28. The Attorney-General has now prece-

dence in England in all courts over all other law officers. The head of an inferior order has been granted precedence over other law officers who were the heads of higher orders of the profession. Why should not a vakil Advocate-General in Madras enjoy the like precedence over the members of a higher order ?

RIGHTS OF RE-MARRIED WIDOWS.

I propose to discuss in this article the question to what extent the rights of a Hindu widow are affected by the provisions of Act XV of 1856. Before, however, proceeding at once to discuss the effect of the provisions of this Act upon the rights of the Hindu widow, it is desirable to ascertain whether the provisions of this Act govern the rights of all widows re-marrying since the passing of the Act. The preamble to the Act is in the following words :—"Whereas it is known that, by the law as administered in the civil courts established in the territories in the possession and under the Government of the East India Company, Hindu widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property; and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the courts of justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own consciences; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain; and the removal of all obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare, it is enacted as follows." This preamble makes it clear that the enabling and disabling provisions of this Act were intended to apply only to such of the Hindu widows as could not have validly re-married but for this Act and not to such Hindu widows as could, under the provisions of any law or on the strength of a valid custom having the force of law, have validly re-married without the legal sanction accorded by this special enactment. The case-law on this point clearly sup-

ports this view. The Allahabad High Court in *Hur Saran Das* v. *Nandi* (I. L. R., 11 A., 330) held that the widow of the sweeper caste in the case who had re-married did not forfeit her interest in her first husband's property on the ground that S. 2 of the Act of 1856 applies only to such persons as could not have validly re-married before the passing of the Act. The Madras High Court also in *Koduthi* v. *Madu* (I. L. R., 7 M., 321) held that the widow in the case who had re-married had forfeited her interests in the estate of her first husband, not by virtue of the provisions of the Widow Re-marriage Act, but by virtue of a special custom which worked such a forfeiture. In the case of Hindu widows, therefore, whose re-marriage is legal otherwise than by virtue of the provisions of this enactment, it may be taken to be settled law that the rights of such widows in the estate of their first husband are determined by the provisions of the law or the incidents of the custom validating their re-marriage.

Another question of some importance is whether a Hindu widow who had abjured the Hindu religion and embraced Christianity does upon her re-marriage forfeit her rights in the estate of her first husband. As already observed the provisions of the Widow Re-marriage Act could not have been intended to apply to widows who were not Hindu widows on the date of their re-marriage. It is evident that the re-marriage of a Hindu widow who had become a convert to Christianity or Muhammadanism does not depend for its validity upon the enabling provisions of the Act of 1856, and it does not therefore stand to reason that her rights should be curtailed in any measure by its disabling provisions. Upon this principle, the Bengal High Court in *Gopal Singh* v. *Dhungazee* (3 W. R. 206) held that the Hindu widow in the case who had re-married after embracing Muhammadanism did not forfeit her interest in her first husband's property as she had ceased to be a Hindu long before the date of her re-marriage. This decision has since been overruled by a Full Bench decision of the same High Court in *Matungini Gupta* v. *Ram Rutton Roy* (I. L. R., 19 C. p. 289). This Full Bench decision while conceding that the re-marriage of such widows does not depend for its validity upon the provisions of this Act, proceeds upon a questionably liberal interpretation of the expression 'any widow' occurring in S. 2 of the Act of 1856. It is argued that the expression 'any widow' is wide enough to include

not only all widows whose re-marriage is legalized by the provisions of this Act but also all widows who were Hindu widows at some time before their marriage though they had ceased to be Hindu on the date of their re-marriage. It is needless to observe that this construction of S. 2 is altogether inconsistent with the scope of this Act avowedly enacted for the purpose of validating widow re-marriages in cases where they were considered illegal before the passing of the Act. I may also here point out that the soundness of the decision of the majority of the Full Bench in this case as resting upon the line of reasoning followed therein is pertinently questioned in a note upon this decision appearing at p. 312 of the second volume of the Madras Law Journal. I am, however, bound to state that the writer of the note leans in favour of the view that the widow under the circumstances would forfeit her interest in her first husband's property irrespectively of the provisions of the Act of 1856. But as a discussion of that question is apparently irrelevant in an article upon the provisions of the Act, I leave the question alone. Anent the decision in *Gopal Singh* v. *Dungazee*, 3 W. R., p. 206, Dr. Mitra observes: "The correctness of this decision is open to question. If the defendant in the case is a Hindu widow, she is subject to the disability of a Hindu widow after re-marriage under S. 2 of Act XV of 1856. If she is not a Hindu widow, then she cannot continue to hold the property, which is given to her as a Hindu widow." (Trailokyanath Mitra on the Hindu widow p. 213). It is significant that the author does not here anticipate the reasoning on which the majority of the Full Bench in the later case rested their decision. As for the dilemma herein expressed, it is evidently harmless. The answer to the first portion is that the defendant in the case is not a Hindu widow, at the date of her re-marriage and the answer to the second is that she had ceased to be a Hindu before her re-marriage and not by virtue of her re-marriage and that if she forfeit her estate at all, it cannot be her re-marriage that works such a forfeiture. Considering, therefore, the scanty and conflicting case-law on this subject, the questionable soundness of the line of reasoning adopted by the majority of the Full Bench in the later case and the fact that all arguments *pro* and *con* have not been fully raised or considered in the two cases, it is but only fair to say the question is still open. I have thus discussed as briefly as space would permit, the question to whom the provisions of the Act apply

and I now proceed to consider how the rights of such of the Hindu widows as come within the scope of the Act are affected by its provisions.

Except in Bombay where the rights of women are considerably larger than in other provinces, the Hindu widow may acquire rights in property in a limited number of capacities, *viz.*, as a daughter, sister, widow, mother, grandmother and great-grandmother. As daughter and as sister, her rights relate to the estate of the family of her birth. Her rights of property in her other four capacities have reference to the property of her husbands, first and second, and of their successors and heirs. The sections of the Act which bear upon her rights in the estate and of the family of her birth are Ss. 4 and 5 which run as follows :—"Nothing in this Act contained shall be construed to render any widow, who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if, before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow." "Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage, forfeit any property, or any right to which she would otherwise be entitled ; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage." S. 4 and the latter portion of S. 5 in so far as it bears upon the question of the right of a Hindu widow succeeding as daughter to the estate of her father, is so much needless legislation except in Bengal. Whether the daughter is childless or whether she has or is likely to have issue is a question altogether immaterial for the purpose of deciding, except in Bengal, whether a daughter is entitled to succeed to the property of her father. A daughter in Bengal who is a childless widow at the time of the death of her father is under the law obtaining in Bengal incapable of succeeding to the inheritance, and S. 4 of this Act is enacted for the mere purpose of preventing the possibility of such a daughter maintaining a claim to the inheritance on the plausible ground that under the provisions of this Act, she could validly re-marry and bring forth legitimate issue. She is at perfect liberty to re-marry during the lifetime of her father and claim the whole or a share of the inheritance

as the circumstances of the particular case may entitle her to on her father's death; but if she choose to remain a widow till her father dies, she cannot take advantage of her mere capacity to re-marry validly under the provisions of this Act, and succeed to the inheritance. It follows from this that a childless widowed daughter who has remarried during her father's lifetime will on her father's death succeed to the inheritance as a daughter likely to have male issue to the exclusion of another childless widowed daughter who has not re-married during her father's lifetime. Again, if the daughter succeeding to her father's property to the exclusion of her sister in the hypothetical case just above cited die leaving male issue, the sister having remarried in the meanwhile, the question might arise whether the sister who was once excluded from the inheritance at the death of her father could not claim to succeed in preference to the male issue of her deceased sister on the ground that having remarried she should be regarded as a daughter likely to have male issue. It is submitted that she could not maintain the claim. The language of S. 4 makes it abundantly clear that a daughter who is a childless widow *at the time of her father's death* is consequently debarred from taking advantage of the provisions of this Act, from asserting a claim to her father's property or any share of it; and as the section contains no stipulation as to time, one is entitled to argue that if she could not claim to succeed to her father's property immediately upon his death, she could *never* do so. To hold otherwise would be to override certain well-recognised principles of Hindu Law; for, if a daughter, not permitted to succeed to the property of her deceased father on the ground that she was a childless widow at the time of his death, were allowed to claim a share in the inheritance upon her re-marriage, the necessary result would be that she would by re-marrying during the lifetime of her sister in the case devest a share of the estate which had exclusively vested in her sister upon her father's death. Again, that a daughter who is a childless widow at the death of her father is debarred from asserting a claim to the inheritance, not only immediately upon her father's death, but also for all time to come appears also to be evident from the fact that the beginning words of clause 1 of S. 5 of the Act refer to S. 4 as one under which a widow by reason of her re-marriage forfeits some property or some right; for if

the right of a daughter—a childless widow at the death of her father—to succeed to the whole or a share of the inheritance by reason of her remarriage subsequent to his death were not intended to be taken away by S. 4 of the Act, it is not easy to see how S. 4 could be said to deprive such widow of any property or right, seeing that, under the law as it stood before the passing of the Act, a childless widowed daughter had no rights of inheritance in her father's property and could not therefore be said to have forfeited any under S. 4 of this Act. Mr. Mitra, in commenting upon the effect of sections 4 and 5 of this Act observes :—"It will follow, therefore, that of two childless widowed daughters of a Hindu, one who marries during her father's lifetime will be entitled to succeed to his property in preference to her sister who chooses to remain a widow, thus holding out a direct inducement to re-marry and placing the daughter who chooses to remain a widow in a disadvantageous position. Why the legislature should have made this distinction, it is difficult to see." (Mitra on 'The Hindu Widow' p. 207). These observations, it is submitted, cannot stand critical examination. The effect of sections 4 and 5 properly understood is obviously not to deprive the widow of any of her rights for choosing to remain a widow but only to prevent her claiming larger rights than she is entitled to on the mere possibility, which may never be realised, of her re-marrying. It would be extremely unfair if a widow who is not re-married were allowed to claim rights of property simply because an Act has been passed whose provisions allow her to re-marry.

The rights of the Hindu widow (who has re-married) in the family and property of her second husband are governed by the latter portion of S. 5 of the Act. "Every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage." The provision is so clear that it needs no comment and could not possibly lead to any controversy. The rights of a Hindu widow (who had re-married) in the family of her second husband are exactly those of a Hindu wife or widow, not so re-married, in the family and estate of her husband.

We have next to consider her rights in the estate and family of her first husband. The sections of the Act which deal with these

rights are Ss. 2 and 3. The effect of S. 3 is to deprive her of her right to be the guardian of his children except where she has been constituted their guardian by the will or testamentary disposition of her deceased husband. S. 2 is thus the most important one affecting the widow's right in the family and estate of her first husband. It runs thus:—"All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died, and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same." The most important question for consideration under this section is whether it operates so as to deprive the widow re-marrying of rights detailed in this section and vested in her before her re-marriage or whether it operates even so as to prevent such rights vesting in her after her re-marriage. In *Okhorah Soot* v. *Bheden Barianee* (10 W. R. 34) where the plaintiff (a Hindu widow who had re-married) claimed to be entitled to inherit the property of her son (by the first husband) who died subsequent to her re-marriage, *Kemp*, J., observed that 'at the time of her re-marriage, no rights and interests, either in the estate of her deceased husband, or in the estate of his lineal succesor, the son, had become vested in the plaintiff; therefore, no estate in which she had any rights and interests ceased and determined upon her re-marriage. After the re-marriage, the son died, and the estate which he inherited from his father devolved on the plaintiff and under S. 5 of the same Act, *viz.*, XV of 1856, she does not by reason of her re-marriage forfeit her right thereto." *Jackson*, J., the other judge who sat with him, however, did not concur in this view. He argued that the intention of the legislature as gatherable from the language of the section and otherwise was to prevent all chances of the re-married widow interfering under any circumstances in her first deceased husband's property and adhered to the opinion that the re-married widow not only forfeited all the vested interests she had in the property of her first husband on the date of her re-marriage but that

she was also incapable of acquiring any rights in the family and estate of her deceased husband subsequent to her re-marriage. As a result of this difference of opinion, the matter went up before *Peacock*, C. J., who fully concurred in the judgment of *Kemp*, J., in *Akorah* v. *Boreanee*, 11 W. R. 82. *Peacock*, C. J., observed:—"In the present case, at that time of her remarriage, the property belonged to her sons and she had no right or interest in that property. It came to her by inheritance from her son, who died after her re-marriage. If the son had pleased, he might have given the property to his mother notwithstanding her re-marriage. At the time of her re-marriage, she had no interest in her deceased husband's property by inheritance to her husband or to his lineal successors. It could not, therefore, cease or determine upon her re-marriage, and if she had died at the time when she had remarried, the property would never have descended to her." Although we have no reason as at present advised to question the soundness of the decision arrived at, we shall not be warranted in saying that the law on the point is settled, seeing that the case just cited is the one solitary instance where the right of a re-married widow to succeed as heiress to her son by the first husband dying after her re-marriage went up before the courts for adjudication though the Act is nearly half a century old. It will therefore be well that the question should be fully considered. *Jackson*, J., in the above case rested his dissenting judgment upon the abstract of S. 2 as indicated by the marginal note to that section and his own inference as regards the policy of the law. It need hardly be said that the marginal note at the best cannot be allowed to sway the mind of a judge while the language of the section is clear and unambiguous. As regards the argument founded on the policy of the law, namely, that the Act was intended to prevent any further interference by the widow, after her re-marriage, in her deceased husband's property, the admitted fact that S. 2 upon any construction does not operate so as to deprive any such widow of more-than-limited interest in her deceased husband's property conferred upon her by any testamentary disposition is sufficient disproof of the soundness of the argument. The words 'may have' do indeed give some support to the contention that a widow forfeits by reason of her re-marriage rights in her husband's property, etc., vested in her before her re-marriage as well as those which she may chance

to acquire after her re-marriage; but the expressions 'upon her re-marriage,' and 'cease and determine' clearly indicate the devesting of vested rights and interests. The last clause of the section 'and the next heirs of her deceased husband or other persons entitled to the property on her death shall thereupon succeed to the same', also supports the view that the section is intended to work a forfeiture only of vested rights; for if the section were intended to deprive a widow of even possibilities of succession the language of this last clause is altogether inappropriate and one cannot really understand how, supposing the widow to forfeit such contingent rights under this section, the person entitled to succeed to the property on her death could succeed to the property upon her re-marriage.

In connection with this section Mr. Mitra suggests another problem for solution: "Suppose in the Mitakshara country a mother, at that time a *wife,* succeeded to the property of her son, and subsequently became a widow and re-married. What will be its effect upon the property which she had inherited from her son? Would she forfeit it, or retain it, is a somewhat difficult question to answer. As she did not get the property as a widow, it may be said she ought not to be deprived of it. On the other hand, it may said, she was holding the property as a *widow,* and therefore, on her re-marriage, she ought to be deprived of it by this section." From the language of the problem it is not possible to ascertain whether the property to which the mother succeeded before her widowhood was the self-acquired property of the son or whether it was the property which the son obtained in a partition with his then living father. If the former, there is no difficulty in the problem at all; for although the widow so acquired the property by inheritance to her then living husband's lineal successors, it was property in which her husband had no manner of interest and the widow's right in such property cannot be said to be *a right in her deceased husband's property.* It is therefore clear that her right in such property, though vested in her before her re-marriage is not and cannot be taken away by the provisions of S. 2 of the Act. If, however, the property was one which the son had obtained by partition with his then living father, the question whether his widowed mother would forfeit her vested right in such property upon her re-marriage is

not free from difficulty. It could be argued with some degree of plausibility that although the property to which she succeeded as heir to her son was not, at the time of the succession, her deceased husband's property, it could still be considered her deceased husband's property in the sense that it was once his. It might thus be urged that the conditions under which a widow re-marrying forfeits her vested rights exist, one and all, in this case and that therefore the widow forfeits her vested rights, though at the time of their vesting in her, she was not a widow. In support of the opposite view, it might be contended that the expression 'in her deceased husband's property' following, as it does, so closely upon the expression 'any widow' should, in fairness, be interpreted to include only such property as continued to be her husband's till she became a widow, *i.e.*, property of which her husband died owner. The latter clause of S. 2 appears also to support this view. This clause which says 'and the next heirs of her deceased husband or other persons entitled to the property on her death shall thereupon succeed to the same,' does not refer to the heirs of her deceased husband's lineal successor's. Another argument in favour of this view is that this disabling section of the Act intended to encourage widow-marriages should if possible be construed so as to preserve, without doing violence to the language of the section, the widow's rights in her first husband's property. One would therefore be inclined, considering all these circumstances, to hold that this section does not deprive the widow of property to which she had during her husband's lifetime succeeded as heiress to her deceased son. I therefore venture it as my opinion, though with considerable hesitation, that the rights which a Hindu widow re-marrying is deprived of under S. 2 of the Act are such of the rights described in the section as vest in the widow between the date on which she becomes a widow and that on which she re-marries.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai *v.* Venkatachalam Chetti, I. L. R., 20 M., 35. The decision in this case appears to us to be doubtful. The learned Judges hold that a sub-mortgagee is entitled to sue for sale of the original mortgagor's

interest, where the original mortgagee could claim to do so. *Subrahmania Aiyar, J.*, relies upon the authority of English cases and the provisions of S. 86 of the Transfer of Property Act. It appears to us that the principle of English cases is not applicable; for the theory of mortgage in the English Law is different from that in this Country. The mortgage involves a transfer of the complete ownership to the mortgagee and all that the mortgagor has is a right to re-conveyance on payment of the money. It is called no doubt the Equity of Redemption. The mortgagee is entitled to sell the property on failure of the condition to repay. Where the mortgagee executes a sub-mortgage, the entire ownership vested in the mortgagee is transferred to the sub-mortgagee who becomes the full owner of the property. As he has the right of sale on failure of the condition to repay, he can sell the whole property and, therefore, the interest of the original mortgagor, and pay himself out of the sale-proceeds. But under the Transfer of Property Act a mortgage is merely the transfer of an interest in the property and the sub-mortgage is the transfer of an interest in the mortgagee's interest. He has ordinarily no right of private sale; there is no privity of contract with the original mortgagor; the privity of estate is only in the interest carved out of the mortgagor's interest. This difference in the conception of a mortgage between the two countries appears to us to justify a departure from the English rule entitling the sub-mortgagee to sell the original mortgagor's interest. The omission in the Transfer of Property Act to provide for sale of the mortgagor's interest in a suit by the sub-mortgagee and to treat the relation between the sub-mortgagee and the original mortgagor when there are numerous provisions about 1st and 2nd mortgagees and subsequent mortgagees appears to us to be of full significance. The reference in S. 86 to plaintiffs claiming by derived title seems to us under the circumstances obviously to refer to assignees of the mortgagee and not to sub-mortgagees. The soundness of the decision, therefore, of the learned Judges appears to us to be questionable and the *dictum* of the Bombay High Court in *Padgaya* v. *Baji*, I. L. R., 20 B., 549, lays down the right principle.

Parvathi Ammal *v.* **Saminatha Gurukkal**, I. L. R., 20 M., 40.

We cannot but regard this decision as laying down an erroneous rule of limitation. A widow claiming possession of the estate of her husband who died in 1884 within twelve years of the date of his death is held disentitled to sue for the recovery of the property from a person claiming to be the adopted son, because the period of six years prescribed by Art. 118 to set aside an adoption had elapsed. This ruling is opposed to principle, to the scheme of the Limitation Act

and to the course of decisions in this Country. No doubt the Privy Council in *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri*, I. L. R., 13 C., 318, placed a construction on Art. 129 of the corresponding Act of 1871, which involved the dismissal of a suit for possession of property where a suit to set aside an adoption would be barred. Their Lordships at that time remarked upon the difference in language in Art. 118 of Act XV of 1877 and suggested that the difference of expression meant a difference in the policy of the Legislature. More recently, however, in three cases, *Mohesh Narain* v. *Taruck Nath Moitra*, I. L. R., 20 C., 494; *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar*, *Ib.* 22 C. 609 and *Sajid Ali* v. *Ibad Ali*, *Ib.* 23 C. 1, there are observations of the Privy Council which seem to indicate that if the question comes before them as regards the construction of Article 118, they may possibly interpret the Article in a manner similar to their interpretation of Art. 129 of Act IX of 1871. We do not think this a sufficient justification for *Shephard* and *Davies, J. J.*, to suppose that the current of authorities in India has been upset by the Privy Council. In a recent case in Bombay the authorities are fully reviewed by *Parsons* and *Candy*, J.J., *Fanyamma* v. *Manjaya Hebbar*, I. L. R., 21 B., 159, and a conclusion arrived at in accordance with reason and principle. Indeed, if their Lordships were pleased to refer to the various Articles in the Limitation Act dealing with suits for declaration of one kind or another, they would realize the mischief of placing this peculiar interpretation on Art. 118 so as to preclude a suit for possession of property after the lapse of a period of six years from the date of setting up an adoption.

Venkiti Naick v. Murugappa Chetty, I. L. R., 20 M., 48. We have no doubt that the decision is right. Where causes of action had been joined without the leave required by S. 44, clause (*a*), the Full Bench holds that the dismissal of the action entitles the plaintiffs suing again to deduct the time of the pendency of the former suit in the computation of the period of limitation. It seems to us, therefore, to be an *a fortiori* case, where the causes of action could not be combined even with the leave of the Court. And the claim for the deduction of the time in such a case of the pendency of the action in the computation appears thoroughly well founded. The decision in *Thirthasami* v. *Seshagiri Pai*, I. L. R., 17 M., 299, appears to us to be erroneous. We cannot think of a better cause of a cause of like nature than misjoinder of causes of action necessarily leading to the return of the plaint or the dismissal of the suit.

Seeni Chettiar v. Santhanathan Chettiar, I. L. R., 20 M., 58. It appears to us that the right to cut and enjoy trees growing and to be

grown on land for a term of years is an interest in immoveable property. As pointed out in *Marshall* v. *Green*, L. R., I. C. P. 35, where it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation, and from the nutriment to be afforded by the land, the right is an interest in immoveable property.

Panchena Manchu Nayar *v.* **Gadanearh Kumaranchath Padmanabhan Nayar**, I. L. R., 20 M. We are glad that the mischievous effect of the decision in I. L. R., 19 M., 31, *Ramasami* v. *Bhagavathar Nagendrayyan*, consequent mainly upon the erroneous understanding of the decision will be dispelled by the present case. As was pointed out in our leader in 6 M. L. J., 127, *Subrahmaniya Aiyar* and *Davies*, J.J., relying on the authority of *Smith* v. *Anderson*, 15 Ch. D., 247, hold that to constitute an association within the meaning of the Companies Act, there should be mutual liability of members, and the provision as regards compulsory registration has no application where such mutual liability is absent.

Chengama Nayudu *v.* **Munisami Nayudu**, I. L. R., 20 M., 75. We do not understand this decision. If the after-born son was in the womb at the date of the partition, the ruling that he is entitled to re-open the partition is intelligible enough; but if he was not, we cannot agree with it. The statement of facts, however, does not show that the after-born son was not in the womb at the time of the partition.

Queen-Empress *v.* **Karuppa Udayan**, I. L. R., 20 M., 87. The question appears to us to be rather a ticklish one. The learned Judges escaped the difficulty by simply following the previous cases; but none of the cases gives an intelligible exposition of the law. We have no doubt that the decision, that the presentation of the appeal by the clerk is good, is a convenient one. Going to the reason of the thing, we must confess, that the clerk is only one kind of agent and in the absence of a statutory declaration there is no justification for preferring one species of agents to another.

Chintamallayya *v.* **Thadi Gangireddi**, I. L. R., 19 M. It seems at first difficult to understand how the Judges came to the conclusion that once an objection about the truth or validity of an award sought to be filed under S. 525 is taken, the Court is powerless to do anything more, but must refer the parties to a regular suit upon the award. There is nothing in Ss. 525 and 526 to prevent the Court deciding upon the objection to th filing of the award. There is so much confusion in the decisions of t]

Courts as regards appeal in respect of decrees passed upon awards under the Code that the error into which *Parker, J.*, fell in *Husananna* v. *Linganna*, I. L. R., 18 M., 423, seems easily explicable. *Subrahmania Aiyar* and *Davies*, J.J., have properly overruled the *dictum* of *Parker, J.*

A. *v.* B., I. L. R., 21 B., 77.

It is refreshing to read Mr. Justice Tyabjee protesting that it is not in the interests of public policy that a husband should supply funds to enable his wife to sue him for divorce. In many cases this would, as the learned Judge puts it, be adding insult to injury. The doctrine of English Law in such cases in favour of the wife is based purely on the old doctrine that by marriage the husband becomes entitled to the whole of the personal property and the income of the real property of his wife; and we share with Justice *Stracey* the doubt whether even in England the rule could apply in the case of parties married after the Married Women's Property Act of 1882. Divorce does not receive special encouragement and we are glad that the Bombay High Court has refused to transplant the English rule in favour of rebellious wives.

Raja Ram *v.* Ganesh Hari, I. L. R., 21 B., 91.

We cannot help thinking that *Farran*, C. J., and *Parsons*, J., have put in this case an unduly narrow interpretation upon the ruling of the Privy Council in *Ramgopal* v. *Shamskhaton*, (I. L. R., 20 C., 93) though we do not quarrel with the actual decision in the case. The question was whether certain acts of user on the part of the plaintiff who sued in ejectment were sufficient to establish his personal ownership against defendant. The District Judge held that in the particular circumstances they were insufficient as they were only causual acts explicable otherwise than by possession being in the plaintiff. This was obviously a question of fact and the High Court had no power to interfere. But the learned Chief Justice observes:—"We consider that this finding (a mixed question of law and fact) as a finding with which upon the principles to which we have adverted, we cannot interfere." His Lordship also observes that where the legal inference to be drawn from facts is doubtful, the High Court has no power to interfere in second appeal. If the inference is one of law and if the High Court can come to the conclusion that however doubtful it might be it is incorrect, it is difficult to see how within the words of section 584 the decision is not contrary to law and the Privy Council in the case referred to has laid down in the broadest terms that an inference of Law is one which the High Court can correct in second appeal. Again where the question is one of mixed law and fact, the High

Courts have often interfered (See *Ponanammal* v. *Muthusamy*, I. L. R., 13 M., 47 ; also *Desai Ranchhoddas* v. *Rawal Nathubhai*, I. L. R., 21 B., 110). In the last case *Jardine* and *Ranade*, J. J., refused to accept a finding on a question of mixed law and fact on the ground that the decision of the lower Court proceeded on a misconception of the onus as to how a special custom must be proved. The Bombay High Court generally acts in a very liberal spirit in construing the powers of the High Court in second appeal and we hope that the case under notice will not mark a departure in its policy.

SUMMARY OF RECENT CASES.

Publishing agreement—Assignability.

Griffith v. Tower Publishing Company, Limited, and Moncrieff [1897, I. Ch. 21, per Stirling, J.].

The cases of *Stevens* v. *Benning* (1 K. and J., 168,) *Read* v. *Bentley*, (3 K. and J., 271) and *Hole v. Bradbury* (12 Ch. Do. 886) establish that a publishing contract between an author and a publisher or a firm of publishers is of a personal nature and that the benefit of it is not assignable. This rule is equally applicable to similar contracts between an author and a limited publishing company.

The plaintiff who was the author of certain novels had entered into agreements with the defendant company for their publication. The company subsequently became insolvent and in an action by a debenture-holder the defendant, Moncrieff had been appointed receiver. The defendant Moncrieff having informed the plaintiff of his intention to sell the plaintiff's books, the plaintiff moved for an injunction to restrain the defendant from selling or assigning the books without the plaintiff's consent. *Stirling, J.*, held that the plaintiff was entitled to the injunction he prayed for and said " A limited company may have a reputation for producing books in good style and attractive form, and an author selecting such a company as his publisher may do so in the reasonable expectation that the company, although its members and its officers may fluctuate, may nevertheless consider itself under an obligation to maintain its reputation."

Signature not final—Parol evidence.

Pattle v. Hornibrook [1897, I. Ch. 25, per Stirling, J.].

The general rule of law is that where a person signs *animo contrahendi* a paper containing the terms of a contract, the terms contained in the paper are conclusive and cannot be varied by parol evidence. But this rule does not exclude evidence to show that there was no agreement at all. The parties may not vary an agreement, but they can show that they never came to an agreement.

The plaintiff signed an agreement for the lease of a house to be let by the defendant to himself and sent it to the defendant. The defendant signed it also and left it with his solicitor with instructions not to part with it unless the plaintiff got some responsible person to join in the lease,—a condition which the plaintiff declined to fulfill. In a suit by the plaintiff upon the lease.

Held.—That there was no lease agreement executed between the parties, that in effect the whole transaction amounted only to a counter-offer to the plaintiff on the part of the defendant and that oral evidence of these facts was admissible.

Trade mark—Distinctive device.

Rowland v. Mitchell. *In re* **Rowland's Trade Mark** [1897, I. Ch. 71, C. A.].

The portrait of the manufacturer of goods is a *distinct device* and is a proper subject-matter of a Trade Mark. *Lord Russel of Killowen*, C. J., who delivered the leading judgment in this case said: "By *distinctive device*, is meant that the device must be something which shall be capable of distinguishing the particular goods in relation to which it is to be used from other goods of a like character belonging to other people. In that view it is difficult to conceive that anything could well be more distinctive than the portrait of a man who professes to manufacture the particular article.

Will—Ambiguity—Evidence Extrinsic.

In re **Stephenson, Donaldson v. Bamber** [1897, I. Ch. 75, C. A.].

A testator by his will gave all the residue of his real and personal estate "unto the children of the deceased son (named Bamber) of his father's sister share and share alike." The testator's father had only one sister who had married one Bamber and had by him three sons, William

Bamber, Rowland Bamber and Durry Bamber, all of whom had several children living at the death of the testator. It was proved that the testator was aware of the existence of all the three Bambers above named and not of any one of them in particular alone.

Held : by the Court of Appeal (reversing the decision of *Kekewich, J.*) that the gift was void for uncertainty.

Hare v. *Cartridge* (1842) 13, Sim. 165 and *Lee v. Pain* (1844), 4 Hare, 201, 249, commented on and distinguished.

Procedure—Misjoinder of parties.

Wynne *v.* **Tempest** [1897, I. Ch. 110. per. Chitty, J.]

The defendant and A were trustees of a settled fund, and A was a partner of a firm of solicitors who were doing business as legal advisers to the trust. A received a sum of money being a part of the trust fund as solicitor of the trust and misapplied it and the money was lost. A then died and the present suit was commenced by the plaintiff against defendant as the surviving trustee for a declaration that he was bound to pay the plaintiff the sum so misapplied by A. The defendant then attempted to bring in the other partners of A's firm of solicitors as parties to the present suit on the ground that they were bound to indemnify him inasmuch as the moneys misappropriated by A were found in the firm's account.

Held by *Chitty, J.*—that the right of the defendant to recover from the surviving partners a sum equal to the lost trust fund is not a right depending on the liability of the defendant in the action and that, whether the plaintiff succeeded in this action or not, he could always pursue his remedy against the surviving partners and that the surviving partners were consequently not proper parties to the suit.

Right to inspect—Right to take copies.

Nelson *v.* **Anglo-American Land Mortgage Agency Company, Limited** [1897, I. Ch. 130, per. Stirling, J.]

It was held in this by *Stirling, J.*, following *Mutter* v. *Eastern Midlands Ry. Co.* (38 Ch. D. 9, 2) that the right of a creditor or member of a company to inspect the register of mortgages under S. 43 of the Companies Act of 1862 (25 and 26 Vict. ch. 89) includes a right to take copies though such a right is not specifically mentioned in it.

Such a right is always to be had in India; *vide* S. 76 of Indian Evidence Act.

Documents more than thirty years old—Presumptions.

In re **Airey, Airey** *v.* **Stapleton** [1897, Vol. I., Ch. 164 per. Kekewick, J.]

The plaintiff claimed under a deed of appointment dated the 19th December 1851. The deed came from an unobjectionable repository and purported to be executed by several persons. It purported to be an appointment under a special power, and to be executed by the attorney of the donee of the power. It was held by *Kekewich, J.*, that, although by reason of the antiquity of the deed, the execution of it by the attorney may be presumed, there was no rule of law which required or justified a court in going further and presuming that the attorney was duly authorised to execute the power; and as there was no evidence of such a power the plaintiff was non-suited.

A similar result would undoubtedly have been arrived in an Indian court; *vide* § 90, Indian Evidence Act.

Joint tenancy—Marriage—Severance.

Palmer *v.* **Rich** [1897, I. Ch. 135, *per Stirling, J.*].

The plaintiff and A (two women) became joint-tenants of certain freehold and leasehold property. A subsequently married the defendant and the defendant and the plaintiff together jointly granted leases of the joint properties reserving the rent to the lessors jointly. After the death of A, the question arose whether the plaintiff survived to the whole estate. After a careful examination of the authorities on the subject *Stirling, J.*, *held.*

1. That marriage in itself does not effect a severance of a joint tenancy either in freehold or leasehold estates;
2. And that a lease given by the husband of a joint tenant in conjunction with the other joint tenant reserving the rent jointly does not convert the joint tenancy into a tenancy in common.

Tender—Cheque—Validity.

Blumberg *v.* **Life-Interests and Reversionary Securities Corporation** [1897, I. Ch. 171].

It was held in this case by *Kekewich, J.*, that if a solicitor is instructed by his client to accept a tender of money he is not at liberty to accept a cheque in the place of the money and the tender of a cheque

for the money to the solicitor is not a sufficient tender. It was argued before him that, as money is generally paid by cheques, the solicitor was at liberty to accept a cheque. But *Kekewich, J.*, held that such an extension of the authority given to the solicitor by reference to the habits of mankind was calculated to work mischief inasmuch as the acceptance of a cheque involved passing a judgment on the solvency of the person who tenders the cheque and ruled that a solicitor who has authority to accept a tender accepts anything short of a tender in cash at his own risk.

Trade fixture—Mortgage—Right of removal.

Hobson *v.* Gorringe [1897, I. Ch. 182, C. A.]

The plaintiff had let out on the hire and purchase system a gas engine to one King, under an agreement which provided that the property in the engine was not to vest in King until he had paid all the instalments and that the hirer was at liberty to remove the engine from the possession of King on failure in payment of any one instalment. The engine, as was known to the plaintiff, was required by King to drive his saw mill and was taken by him to his premises and was there affixed to the land by means of screws and bolts so as to prevent it from rocking, and was used by him for the purposes of his trade. King then mortgaged the land in question (together with the enginehouse, warehouse, &c.,) to the defendant *Gorringe* who had no notice of the agreement with the plaintiff subject to the usual proviso for redemption. King subsequently became a bankrupt and the defendant, his mortgagee, entered on the premises and took possession of it including the gas engine which he found there fixed to the soil. The plaintiff whose instalments had not been duly paid by King now sued the defendant for the recovery of the gas engine: The Court of Appeal held—

1. That the object of the annexation of the engine to the soil and the degree of annexation clearly made it a fixture, *i.e.*, part of the soil as between King and the defendant, subject to the right of the plaintiff under his contract to remove it on failure to pay any instalments, and that the fixture passed to the defendant under his mortgage.

2. That such right of the plaintiff was not either an easement or a covenant running with land and imposed no legal obligation on any grantee from King of the land.

3. That the right of the plaintiff under his contract could not be enforced against the defendant who was a *bona fide* purchaser for value without notice of the plaintiff's agreement.

4. And that even if it could be supposed that the defendant had granted a licence to King to remove the fixtures by reason of the fact that he had allowed King to remain in possession, such licence was determined by the defendants entering upon and taking possession of the land and the engine.

Holland v. *Hodgson*, L. R., 7 C. P., 328, commented on and the observation of *Lord Blackburn* with respect to "the circumstances to shew intention" to make a chattel a fixture, discussed, and the nature of the circumstances indicated.

We presume the case would have been decided in exactly the same manner if it had arisen in India; *vide* the Transfer of Property Act, S. 3 (*c*), Ss. 8, 40, 41.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Educational Review for March 1897 (*in exchange*).

Green Bag for March 1897 (*in exchange*).

The Canadian Law Times for March 1897 (*in exchange*).

The Albany Law Journal for March 1897 (*in exchange*).

The Havard Law Review for March 1897 (*in exchange*).

The Yearly Abridgment of Reports in 1896.—By Arthur Turnour Murray, B.A., Bar.-at-Law. Published by Butterworth & Co., 1897.

The Indian Evidence Act with notes by Sir William Markby, K.C.I.E.

Encyclopædia of the Laws of England, Edited by A. Wood Renton, M.A., LL.D., Bar.-at-Law.

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How cases are decided.—The way cases are considered and disposed of by the Supreme Court of the United States was described by Mr. Justice Brewer in the course of his response to a toast at a banquet given by the Bar of the Sixth Federal Circuit at Cincinnati, October 3, 1896. On this point he said:

"In my intercourse with the members of the Bar I have found to my great surprise that the impression prevails with some that cases, after being submitted, are divided among the judges, and that the court bases its judgment in each one wholly upon the report made by some one judge to whom that case has been assigned for examination and

report. I have met with lawyers who actually believed that the opinion was written before the case was decided in conference, and that the only member of the Court who fully examined the record and briefs was the one who prepared the opinion.

"It is my duty to say that the business in our Court is not conducted in any such mode. Each Justice is furnished with a printed copy of the record, and with a copy of each brief filed, and each one examines the records and briefs at his chambers before the case is taken up for consideration. The cases are thoroughly discussed in conference—the discussion in some being necessarily more extended than in others. The discussion being concluded,—and it is never concluded until each member of the Court has said all that he desires to say,—the roll is called, and each Justice present and participating in the decision votes to affirm, reverse or modify, as his examination and reflection suggest. The Chief Justice, after the conference, and without consulting his brethren, distributes the cases so decided for opinions. No Justice knows, at the time he votes in a particular case, that he will be asked to become the organ of the Court in that case; nor does any member of the Court ask that a particular case be assigned to him.

"The next step is the preparation of the opinion by the Justice to whom it has been assigned. The opinion, when prepared, is privately printed, and a copy placed in the hands of each member of the Court for examination and criticism. It is examined by each Justice, and returned to the author, with such criticism and objections as are deemed necessary. If these objections are of a serious kind, affecting the general trend of the opinion, the writer calls the attention of the Justices to them, that they may be passed upon. The author adopts such suggestions of mere form as meet his views. If objections are made to which the writer does not agree, they are considered in conference, and are sustained or overruled as the majority may determine. The opinion is reprinted so as to express the final conclusions of the Court and is then filed.

"Thus, you will observe, not only is the utmost care taken to make the opinion express the view of the Court, but that the final judgment rests, in every case decided, upon the examination by each member of the Court of the record and briefs. Let me say that, during my entire service in the Supreme Court, I have not known a single instance in which the Court has determined a case merely upon the report of one or more Justices as to what was contained in the record and as to what questions were properly presented by it. When you find an opinion of

the Court on file, and published, the profession have the right to take it as expressing the deliberate views of the Court, based upon a careful examination of the records and briefs by each justice participating in the judgment."—*Case and Comment.*

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Marriage, almost compulsory.—The wise legislators of the Argentine Republic have been much troubled about providing a population for their large and fertile country. They have decided to provide a remedy by making marriage almost complusory.

A law has been introduced, the first clause of which reads: "On and after the 1st day of January 1897, every male from the age of twenty to eighty shall pay a tax till he marries, and shall pay it once in every month."

The next clause is more severe, and reads: "Young celibates of either sex who shall without legitimate motive reject the addresses of him or her who may aspire to her or his hand, who continue contumaciously unmarried shall pay the sum of five hundred paisties for the benefit of the young person, man or woman, who has been so refused." —*Green Bag.*

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Injunctions for Public Purposes.—A matter of great popular interest at the present time, the extent of the power of the courts to issue injunctions, at the suit of the government, in restraint of public nuisances, is well discussed by the Texas court in the recent case of *State v. Patterson*, 37 S. W. Rep., 478. In this case the State brought a Bill for an injunction against the keeper of a common gambling house. The Court refused to grant the injunction, on the ground that the case was a purely criminal one, in which it did not appear that any irreparable injury to property or civil rights was threatened. In this conclusion the Court was doubtless right. The opinion of Mr. Justice Neill is of great value, however, as showing the true extent of the power to issue injunctions in such cases. It is there strongly asserted in contradiction to a notion now generally current, that the mere facts that acts enjoined would constitute, if committed, a criminal offence, is no reason why Courts of equity should not interfere to prevent their occurrence. As it is also distinctly recognised throughout the opinion that the irreparable injury which the court will interfere to prevent need not be an injury to tangible property, but may be an injury to the civil rights of a private person or of the public. In taking this broad view of the proper use of injunctions the Supreme Court of Texas approves the unanimous

opinion of the Supreme Court of the United States in the important case. *In re Debs*, 158 U. S., 564. That these cases are non-established law is shown by the very fact that the Bill has been proposed in Congress to out down by statue the power of the Federal Courts to enforce such injunctions.—*Harward law Review.*

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Recovery of rent under an ultra vires lease.—The New York Court of Appeals has further indicated its position on the troublesome doctrine of *ultra vires* in *Bath Gaslight Co. v. Claffy*, 45 N. E. Rep. 390. Plaintiff, a gas company, executed on *ultra vires* lease of its entire plant and franchises. The lessee after occupying for some time made default in the payment of rent, and finally the lessor resumed possession. This was an action against a surety on a bond conditioned for the performance of the lessee's covenants to recover the amount of the rent that accrued while the lessee was in actual possession. The Court *Vann*, J., dissenting, affirms the judgment for the plaintiff going squarely on the theory that the lessee was liable to this extent on the lease. In delivering the opinion of the majority, *Andrews*, C. J., says: " We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that as between the parties, so long as occupation under the lease continued, the lessee was bound to pay the rent and that its recovery may be enforced by action on the covenant." This is not affected by the *quasi* public nature of the corporation. Whether a lessee can escape further liability on the lease by abandoning possession is left an open question.

This decision throws additional light on the Court's view of the requirements of public policy. Direct proceedings by the State afford sufficient remedy for violations of the Charter, while honesty and fair dealing demand the payment should be made for benefits received. To reach this result by implying a contract, after holding the actual contract void, is mere evasion. This result is in line with the position taken by Mr. Morawetz. As the elements of contract are present and there is no illegality in the proper sense, to allow recovery on the contract where either party has performed best satisfies the requirements of public policy. Until there is performance the contract is voidable. *Morawetz, Corp* 2, Ss. 650, 685, 689.

But where shall the line be *drawn ?* If the contract is good in part, will the Court give damages for breach of unexecuted part ? If so, what performance will be required to bring about this result ? It has often been said that performance cannot give validity to that which is void in

its inception. Mr. G. W. Pepper in an article in 9 *Harvard Law Review* 255, 269, points out theoretical difficulties that confront a court, which, taking this view of public policy, is yet unwilling to hold all corporate contracts binding upon the parties.—*Harvard Law Review.*

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Criminal Law—Homicide—Self-defence—Duty to retreat.—*Held,* a person who is unlawfully attacked by another may stand his ground and use such force as at the time reasonably appears to him to be necessary to protect himself. (*State v. Hatch,*) 46 Pac. Rep. 708 (Kan).

This is true up to certain point. Doubtless a person who is unlawfully assaulted may stand his ground and meet force with force, so long as there is no question of extreme violence or taking life. But where there is a state of facts, such that the person attacked has the alternative of retaining or killing his assailant, there seems no doubt that he ought to retreat. He should take his assailant's life only when in his opinion, as a reasonable man, that is the only means of saving his own. 9 *Harvard Law Review* 214; *State v. Donnelly,* 69 Iowa 705. The Kansas Court on the contrary expressly repudiates this view, and lays down the dangerous principle that one unlawfully attacked need never retreat, but may meet force with force to the last extreme.—*Harvard Law Review.*

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Persons—Sale of opium to wife.—*Held,* that a husband may recover damages from a druggist who against the husband's orders has sold laudanum to his wife in consequence of which she has become a confirmed subject of the opium habit resulting in the loss of her services and companionship, 25 S. E. Rep. 972 (N. C).

In North Carolina a husband is entitled to a wife's earnings so that the plaintiff has suffered a more tangible injury than mere loss of companionship. The Court takes the ground that the defendant is liable because he has wilfully assisted the wife in doing the act which has deprived her husband of her services and companionship. To be sure it was in the course of business and with the purpose of gain, but that hardly justifies the voluntary infringement of the husband's rights. *Hoard v. Peck,* 56 Barb., 202, is in accord with the principal case. It would be interesting to see whether the same view would be taken to-day in jurisdictions where by statute a married woman is practically independent. In such state it seems that the same rule shoulda pply to actions

by the wife for loss of her husband's companionship under like circumstances.

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Public officer—Liability for public moneys.—The defendant, a town supervisor, deposited with a firm of bankers to his credit as supervisor, public moneys in his hands. The banking firm failed and the money was lost. The defendant acted with good faith and without negligence. Action was brought by the County Treasurer on the defendant's official bond. *Held*, on grounds of public policy that the defendant being under the duty to account as a debtor for the public funds in his custody was liable. *Tellinghart* v. *Merril*, 45 N. E. Rep., 375 (N. Y.), Gray, J., dissenting.

Strangely enough this question is now passed upon for the first time by the New York Court of Appeals. The decision seems to reach a just result and to be in accord with cases in other jurisdictions which hold that a public officer required to account for public moneys coming into his hands is liable even though the money be lost by theft, bank failure, or the like, without his fault unless relieved from his responsibility by statute. See a recent case, *Fairchild* v. *Hedges*, 44 Pac. Rep. 125; *U.S.* v. *Prescott*, 3 How. 578; *Inhabitants of Hancock* v. *Hazzard*, 12 Cush 112; *State* v. *Harper*, 6 Oh. St. 608. 1 *Dillon on Munic Corps*, S. 237 N. 4.; decisions cited in the principal case. But see also the dissenting opinion of Hoyt, C. J., in *Fairchild v. Hedges, supra.*

The Court in the principal case by stating the defendant's liability as that of a debtor, probably did not mean to imply that he was not a trustee. That a public officer, much like a *del credere* factor, is a trustee, although held to the strict liability of a common law debtor, is indicated by the fact that he may be indicted as an embezzler. Furthermore, it would seem that if the officer became bankrupt and the public funds were traceable, the organization to which he was responsible would have a specific claim on the funds and would not come in as a general creditor. The Court in the principal case leave open the question as to the legal result were the officer prevented from responding by the act of God or the public enemy, intimating, however, that in this case he would be exonerated. There is thus suggested a very strong analogy between a public officer and a common carrier.—*Harvard Law Review.*

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Torts—Proximate cause—Injuries from fright.—Defendant, by negligent driving, frightened plaintiff, so that she afterward suffered a

miscarriage and a long illness. *Held,* that no recovery may be had for injuries resulting from fright, caused by negligence of another, where no immediate personal injury is received and that the negligence was not the proximate cause of the miscarriage. *Mitchell* v. *Rochester Ry. Co.*, 45 N. E. Rep. 354 (N. Y.)

This reverses in a short opinion a long and carefully reasoned decision in the Circuit Court, 25 N. Y. Supp. 744, affirmed by the Supreme Court, 28, N. Y. Supp. 1136. The Court of Appeals is influenced largely by fear of opening the way for speculative claims and admits no distinction in that respect between cases where the suffering is purely mental and those where the actual physical damage follows. The reasoning of the lower Court, 25 N. Y. Supp. 744, is much more satisfactory, though of course the authority of *Victorian Ry. Commissioners* v. *Coultas,* (13 App. Case 222, (Privy Council) is very strong in support of the final decision. The case is discussed at length in a note 7 *Harvard Law Review* 304. See also 10 *Harvard Law Review* 239.—*Harvard Law Review.*

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List of Advocates-General of Madras from 1795 *to* 1897 *with their respective qualifications.*

1. *Mr. Benjamin Sullivan* was Attorney-General in the Mayor's Court and the Recorder's Court from 1795 to 1801. He was raised to the bench as a Judge of the Supreme Court when that Court was established in Madras in 1801. *Mr. Benjamin Sullivan* must have been a Barrister-at-Law since the statute required that the Judges of the Supreme Court should be Barristers-at-Law.

2. *Mr. Robert Williams* was the Company's Acting Advocate-General in 1803. Before he became Advocate-General he was the Company's Solicitor from 1795 to 1801 in the Mayor's Court and the Recorder's Court. He arrived at the Madras Presidency in September 1785 as a Cadet, was subsequently in the 19th Dragoons and was enrolled as an Advocate, Attorney, Solicitor, Proctor and Notary Public of the Mayor's Court on 1st December 1789. From the account given of him in the Recorder's Court roll, it seems pretty clear that he was not a Barrister-at-Law.

3. *Mr. Alexander Antruther* was the next Advocate-General. He held the office from 1804 to 1812 when he was appointed Recorder of Bombay. He is described in the Recorder's Court roll as a Barrister of Lincoln's Inn and as licensed by the Court of Directors to practice pursuant to the Charter of 1798 establishing the Recorder's Court at Madras.

4. *Sir Samuel Toller* succeeded Mr. Alexander Antruther and was Advocate-General from 1813 to 1821. It does not appear whether he was a Barrister-at-Law or not.

5. *Mr. Herbert A. D. Compton* succeeded Sir Samuel Toller. He was appointed Acting Advocate-General in 1822 and was confirmed in 1823. Mr. Compton landed at Madras in June 1790 and was a Lieutenant in His Majesty's 74th Regiment till August 1796. He was enrolled as an Advocate, Attorney, Solicitor, Proctor and Notary Public on 5th September 1797 in the Mayor's Court at Madras. Mr. Compton held the office of Company's Junior Counsel in 1803 when Mr. Robert Williams was the Company's Acting Advocate-General, till the office of Junior Counsel was abolished by the order of the Court of Directors in the same year. When Sir Samuel Toller was appointed Advocate-General, the office of the Company's Junior Counsel seems to have been specially revived for two or three years, for it appears that Mr. Compton held that office from 1813 to 1815. Mr. Compton was Advocate-General from 1822 till some time in 1828. From the account given of him in the Recorder's Court roll, it would seem that he was not a Barrister-at-Law.

6. When Mr. Compton intimated to the Company his intention to retire from office in 1827, the Court of Directors appointed *Mr. George Norton*, who was then Advocate-General of Bombay, to succeed Mr. Compton on his retirement. Mr. George Norton assumed charge of his office some time in 1828 and continued to hold the same till 1853. He seems to have gone on leave for a short time in 1833 when Mr. William Bathie acted for him. Mr. George Norton seems to have been a Barrister-at-Law.

7. *Mr. Thomas Sydney Smith* who was also a Barrister at-Law succeeded Mr. George Norton in 1853 and held the office till 1864. He was enrolled as an Advocate of the Supreme Court in 1836 and also as a Vakil of the late Sudder Court. Accordingly he is described as a Vakil in the Sudder Court Reports. Though by Act I of 1846 every Barrister of any of Her Majesty's Courts of Justice in India was entitled as such to plead in the Sudder Courts of the East India Company subject to all the rules in force in the said Sudder Courts applicable to Pleaders, yet every Barrister seems to have got himself enrolled as a Vakil or Pleader of the Sudder Courts, in order that, like Vakils, he might plead and also act. When both the Supreme Court and the Sudder Court were abolished and the present High Court was established in their stead in August 1862, the Advocates and the Attorneys of the Supreme Court were enrolled as Advocates and Attorneys of the new High Court, while

at the same time the Vakils of the Sudder Court were enrolled as Vakils of the High Court, and it appears that Mr. Sydney Smith, Mr. J. B. Norton and Mr. J. D. Mayne and others who, prior to the establishment of the High Court, were both Advocates of the Supreme Court and Vakils of the Sudder Court were accordingly enrolled Advocates and Vakils of the High Court. By the rules passed by the High Court on 28th August 1862, Vakils of the High Court were allowed to *plead* and *act* for the suitors of the Court only in all matters of appellate jurisdiction, civil or criminal, and in matters of extraordinary original civil jurisdiction under section 13 of the Letters Patent. By the same rules it was provided that an Advocate of the Court could only *appear* and *plead* while an Attorney could only *act* for the suitors of the Court in all matters, civil and criminal. It was only as a Vakil that an Advocate or Attorney could *act* and *plead* on the appellate side of the High Court, and therefore such of the Advocates and Attorney as were already enrolled as Vakils of the Sudder Court were enrolled as Vakils of the High Court. When Advocates and Attorneys who had been practising as Pleaders in the Sudder Court were allowed to get themselves enrolled as Vakils of the High Court, the question of rank and precedence between them and the Native Vakils who had also got themselves enrolled as Vakils of the High Court had to be settled, and the High Court by the rules of 28th August 1862 provided that Advocates and Attorneys after they had been admitted as Vakils would, when they pleaded in their character of Vakils, have rank and precedence as Vakils, and their standing should for this purpose date from the time of their first admission to practise in the same manner as Pleaders in the late Sudder Court. By this rule Native Vakils had rank and precedence over Advocates and Attorneys enrolled as Vakils according to their seniority as Vakils. The Asylum Press Almanack for the year 1863 gives a list of Vakils of the High Court in the following order:—

S. Tirumala Charry.
Alexander M. Ritchie, (Barrister-at-law).
P. B. Gordon, (Attorney-at-Law).
J. B. Norton, (Barrister-at-law).
J. D. Mayne, (Barrister-at-Law).
Hon. V. Shadagopa Charlu and others.

The list of Vakils is given in the above order in the Asylum Press Almanack till 1873, when, for the first time, the Almanack omits the name of Barristers and Attorneys from the list of Vakils. In October 1863, rules were framed prescribing the qualifications for admission of persons

as Advocates, Vakils and Attorneys of the High Court, and it was provided that Vakils admitted under those rules were entitled to appear and plead and act on all sides of the High Court including the original side. Barristers who were enrolled as Advocates under the rules of 1863 were not enrolled as Vakils. Though as a matter of fact, they act like Vakils on the appellate side, there does not seem to have been a rule permitting them, not only to plead, but also to act on the appellate side. Having regard to the question of precedence on the appellate side as settled by the rules of 1862 and to the fact that all the branches of the profession act alike as Vakils on the appellate side, it is by no means clear that on the appellate side, Barristers or Advocates as such will have precedence over Vakils. In Calcutta the case is somewhat different, for Barristers practise only as Advocates and do not act like Vakils on the appellate side.

8. *Mr. John Bruce Norton* succeeded Mr. Sydney Smith as Advocate-General and held the office from 1864 to 1871, except when he went on leave in 1867. Mr. J. D. Mayne then acted for him.

9. *Mr. J. D. Mayne*, who had acted for Mr. J. B. Norton in 1867, was again appointed to act as Advocate-General in 1872. He does not seem to have been confirmed in the office, for Mr. H. S. Cunningham was appointed Advocate-General in the same year.

10. *Mr. Cunningham* was Advocate-General from 1872 to 1878, when he was raised to the Bench as a Judge of the Calcutta High Court.

11. *Mr. Cunningham* was succeeded by Mr. *P. O'Sullivan*, who held the office from 1878 to 1888, when he died.

12. *Mr. H. H. Shephard* acted as Advocate-General during Mr. P. O'Sullivan's absence in 1886 and was appointed permanently to the office in 1889, but was immediately raised to the Bench as a Judge of the Madras High Court.

13. *Mr. Spring Branson*, who was appointed to act as Advocate-General immediately on Mr. P. O'Sullivan's death in 1888, was again appointed to act for Mr. Shephard, and was finally confirmed in the office in 1890. He held the office till February 1897, except for a short time in 1892 when he went on leave.

14. *Mr. H. G. Wedderburn* acted as Advocate-General during Mr. Branson's absence on leave in 1892.

15. When Mr. Branson took leave in February last, *the Hon. Mr. V. Bhashyam Iyangar*, a Vakil of the High Court of Madras, was appointed as Officiating Advocate-General.

Note.—The above is compiled from such authentic sources as are available in Madras.

REVIEWS.

The Yearly Abridgment of Reports in 1896—by *Arthur Turnour Murray*, B.A., Barrister-at-Law.—Published by Butterworth and Co., 1897;—We have nothing but praise for this excellent publication. The digest shows that the author has studied every case, and his careful analysis of the points decided in each case must indeed be very useful. The plan of the book is altogether new and the alphabatical list of defendants' names is a novel feature. The carrying on of such a work year after year would add many bulky volumes. But that is a disadvantage incident to every carefully-prepared digest.

The Indian Evidence Act with notes, by *Sir William Markby*, K.C.I.E. Sir William Markby requires no introduction to the Indian Reading Public. As a distinguished Judge of Calcutta and as a Jurist his reputation stands very high. The book we have before us is a critical study of the language of the Act, and we have no doubt, it must be useful to students for whom it is intended and to the legislator who may undertake the task of revising the Act. Many of the criticisms are characterized by strong common sense. We have however been somewhat disappointed in the book. We are unable to agree with some of the criticisms made by Sir William. In his notes to S. 92, the author says that if there is a rule of law which requires the transaction to be in writing any separate agreement must also be in writing. We do not see how this statement follows. A mortgage should be in writing, but it does not follow that a separate oral agreement that the trees upon the premises should not be cut or that the mortgaged premises should be kept in repair, should be in writing. Again Sir William says that S. 93 applies only when a writing is required by law. But the very first illustration to the section, of an agreement to sell a house for Rs. 1,000 or Rs. 1,500, shows that the section applies to cases other than those required by law to be in writing. In his notes to S. 104 speaking of the

burden of proof he points out a peculiarity in criminal cases that the burden is not shifted when the defendant pleads a general or special exception. Sir William appears to forget that the apparent difference is duo to the difference in the system of pleading in criminal cases. If the accused, instead of being asked at the close of the evidence for the prosecution what he has got to say, were asked the question at the beginning of the trial and he pleaded an exception, the burden would be shifted from the prosecution and he would have to begin. The difference therefore is due not to the operation of the rule of evidence but to the rule of pleading. Speaking of S. 106, he suggests that it cannot apply where the person having special knowledge cannot be called as a witness. This seems wrong, for in prosecutions for not taking out licenses under the Municipal Acts, the accused cannot be called as a witness to prove the license. We feel, however, bound to add that there are valuable suggestions made by the author in other places. His criticism of the relevancy sections at pp. 17 and 18, his remark that there is nothing in the Act to show that the statements referred to in section 19 can be proved, and his question, who are the other two, as regards the heading "opinions of third persons" to S. 45 are very suggestive. We can commend the book to the perusal of every careful student of the Act. In these days of elaborate commentaries with strings of cases making it difficult to see the principle of the section, it is good to have a book from the pen of a competent writer drawing attention to the language of the Act and the points suggested by it.

Encyclopædia of the Laws of England—Edited by *A. Wood Renton*, M.A., LL.B., Barrister-at-Law, Vol. I :—

We have looked through this extremely useful book and we feel that no legal library will be complete without it.

The abridgments which have a standing in the field of English Law, such as Bacon's and Viner's are very much out of date, and a book, therefore, treating of the law with all its developments up to the present date is a great desideratum. Such a want is supplied by the present volume and its promised successors. The publisher's notice informs us that the work will be completed in 12 vols., and we cannot regard the price of £ 1 per volume as too high as law books go. We have every guarantee for the excellence of the book in the fact that many of the contributors are well-known names in the field of legal authorship. We have looked through several titles in the book and we find the information interesting

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The Madras Law Journal.

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THE LAW OF DÁMDUPAT IN INDIA.

The rule of *dámdupat*, a word which we owe to the Bombay lawyers, in whose Presidency the doctrine has more extensive applicability and has received more developments than in any other, is a rule of Hindu law, resting, like most such rules, upon a combination of old Hindu texts with their commentaries and modern judicial decisions extending and adapting them to the exigencies of new circumstances. Three questions arise with regard to it, *viz.*: (1) What is the law of Dámdupat? (2) Between what people is it applicable? and (3) Is it in force in this country under the enactments in force or the practice prevailing in it, and if so, in what places? These questions must be separately considered.

The rule of *dámdupat* may be summarised in the words of S. 12 of Bombay Regulation, V of 1827, as limiting the interest on money to the amount of the principal. From this succinct statement of the rule, various questions arise. Does 'interest' mean the arrears of unpaid interest or does it include previous payments also? Does 'principal' similarly mean "the balance of principal due or the amount of the original loan"? Does it apply in cases not of mere loans, but of pledges and mortgages, and if so, does it apply when the creditor is charged with the rents and profits of the property mortgaged? Does again the rule affect interest subsequent to the date of the plaint or of the decree? For the proper elucidation of these points, a consideration of the ancient texts is necessary.

The principal text is that of *Manu* who speaking of interest says:—

Ch. VIII. 140. 'A lender of money may take in addition to his capital the interest allowed by *Vasishtha*, that is, an eightieth part

of a hundred, or one and a quarter by the month, if he have a pledge. 141. Or if he have no pledge, he may take two in the hundred by the month, remembering the duty of good men; for by thus taking two in the hundred, he becomes not a sinner for gain." Again,

151. "Interest on money received at once (not year by year, month by month or day by day, as it ought) must never be more than enough to double the debt (that is, more than the amount of the principal paid at the same time.)

152. On grain, on fruit, on wool or hair, on beasts of burden (lent to be paid in the same kind of equal value) it must not be more than enough to make the debt quintuple.

153. Stipulated interest beyond the legal rate and differing from the (preceding) rule, is invalid; and the wise call it an usurious way of lending."

The words in brackets are the gloss of *Kulluka*. *Vishnu* says, Ch. VI, 11:—"On precious metals or gems the interest shall rise no higher than to make the debt double." *Gautama*, Ch. XII, 31:—"If the loan remains outstanding for a long time, the principal may be doubled (after which interest ceases). 36. The interest on products of animals, on wool, on the produce of a field and on beasts of burden, shall not increase more than five-fold the value of the object lent." *Brihaspati*, Ch. XI, 13:—"On the precious metals or gems, the interest may make the debt double." *Katyayana*:—"For gems, pearls and coral, for gold and silver, the interest stops when it doubles the debt." And *Yajnavalkya*, Ch. II, 39:—"The utmost increase [a creditor can lawfully exact from his debtor] consists in the case of female beasts, of their progeny; in the case of fluids, of their eight-fold; in the case of cloth, corn and gold, of their four-fold, three-fold and two-fold (respectively.)" The words 'precious metals,' 'gold' and 'silver' in the above passages refer to money and they are quoted as so referring in the Vyavahara Mayukha, Ch. V, Sec. 11, Ss. 6, 7, which is in its turn quoted with approval by the Bombay High Court in *Khushalchand* v. *Ibrahim*, 3 Bom., A. C., 23.

Thus, no interest, legal or stipulated, could be taken beyond the prescribed rate; and interest could not exceed principal in the

case of money lent, and certain other fixed proportions in the case of other goods. Commenting on Manu's verse, 151, quoted above. *Vijnaneswara* says :—*Received at once;* another reading is *lent at once.* Money so lent can only be doubled; but recovered from one person and lent to another, it may be more than doubled. On the first reading, *sakrīdáhrítá,* 'received at once' the text should thus be expounded :—'interest on money, received by degrees, day by day, month by month, or year by year, may be doubled.' The second reading conveys what is almost a truism, namely, that while a person cannot recover more than double the debt from one person, he may by successive loans to different persons more than double his original principal. On the first reading, previous part-payments of interest are not to be taken into consideration in applying the rule of *dámdupat.* *Raghunandana* is to the same effect :—Vyavahara Mayukha, Ch. V, S. 11, Ss. 6, 7, "But in any case where it (interest) is realized (by degrees) or at various times also, more than the legal or allowable interest may be levied, according to *Vijnaneswara* and other authorities." And it was so expressly decided in *Dhondu* v. *Narayan,* I. L. R., 1 B., 47, on a review of the above authorities and overruling the previous decisions of the Sudder Court.

The converse case is where part-payments of principal have been made, when the question arises whether interest should be *limited to* the balance of principal or the original loan. There is a paucity of ancient authority on the subject. 'The sages of Hindu law did not foresee every case that might arise; and probably left this question to be decided by the judges, who give weight to the general spirit of the law, including regard to custom and equity.' Per *Jardine,* J., in I. L. R., 20 B., 612. While the text of *Manu* itself speaks ambiguously of 'principal,' the gloss of *Kulluka* explains it as meaning principal paid at one and the same time,' that is, the balance of 'principal'; In *Kakarlapudi* v. *Uppalapadi,* 1 M. H. C. R., 5, the original loan was Rs. 2,042-0-10, part-payments had been made from time to time and credited towards the principal: the balance of principal due was Rs. 617-0-10 and interest Rs. 2,350-3-3. The lower Court allowed both these sums in full. But on appeal, the High Court restricted the amount of recoverable interest to the original principal, *viz.,* Rs. 2,042-0-10.

The *actual* decision was no doubt given under S. 4 of Madras Regulation 34 of 1802 which enacted that 'where interest on debts or on money lent may have accumulated so as to exceed the principal money, the Courts of Adawlut shall not decree a greater sum for interest than the amount of such principal money.' But as the expression 'principal money' is ambiguous and as the Regulation was intended to embody the Hindu law on the subject, this case may be taken to be an authority on that law as well. In *Dagdusa* v. *Ramachandra,* I. L. R., 20 B., 611, the plaintiff sued upon an instalment bond, under which many instalments had been punctually paid *but the rest not.* The interest on the unpaid instalments exceeded the total amount of those instalments, but was less than the original loan. It was held that the plaintiff was not entitled to recover interest exceeding the balance of principal actually due at the time the debt was sued for.

The actual decision in this case may no doubt be supported on the ground that a number of the instalments under the bond sued upon having been duly paid, no interest began to accrue until the date of default and the principal money in these circumstances was the amount on which the interest accrued, that is, the amount of the instalments due. So far as the case goes beyond this, it is open to serious question. *Ranade,* J., in his judgment in that case relies much upon 'the explanatory words' in the text of *Manu:* but they are only the gloss of *Kulluka* unsupported by any authority. *Manu* qualifies 'interest on money' by the words 'received at once' and the absence of similar words with regard to 'principal' may not improperly lead to the inference that it was not intended to be so qualified. *Shri Ganesh Dharnidar* v. *Keshavrav,* I. L. R., 15 B., 624, quoted by the learned Judge as supporting his view, does not appear, even after careful examination to have at all touched the question, as it proceeded upon the assumption that the whole of the receipts was to be credited towards interest. On the other hand, the words of *Telang,* J., 'the ground of equity on which that rule rested does not justify a decree in favor of the mortgagee for more than double the amount *actually advanced*' show that the limit of interest in the learned Judge's mind was the amount advanced and not the balance due. The case in 1 M. H. C. R., 5, is again quoted by *Ranade,* J., as restricting interest recoverable to the balance of principal due, where part-payments of principal have been

made, while, as we have seen, it decides that interest equal to the original principal may be recovered. Another argument of the learned Judge is that the exclusion of the *dámdupat* rule in cases of mortgages where the rents and profits have to be set off against interest and principal, and its limitation to cases where the account has to be taken only on one side, are based upon the consideration that interest should not exceed the balance of unpaid principal. It is difficult to see how it is so. It must be remembered that when rents and profits are appropriated to principal and interest, interest will be first cleared, before appropriation is made to the principal. In such a case, the rule that interest should not exceed the balance of principal can work no more hardship to the creditor than in the case of ordinary loans and does not necessitate the exclusion of the *dámdupat* rule. According to the learned Judge's interpretation, a creditor, for instance, receiving payment of the principal can never after recover the interest, as the balance of principal becomes *nil.* Instead of relieving debtors, as the learned Judge supposes, the only effect of such a rule would be to make creditors *chary* of accepting part-payments of principal to make it run on to the prejudice of the debtors.

The next question is whether the rule of *dámdupat* is applicable to pledges and mortgages. In *Narayan* v. *Gangaram*, 5 B. H. C., 157, the rule was held not to apply to pledges and mortgages, it having been so held on several previous occasions in the same Court. But in *Nathubai* v. *Mulchand*, 5 B. H. C., 196, this was dissented from and the rule was held to apply to all mortgage-debts where no account of rents and profits had to be taken; but it was held that 'where there is an account of rents and profits to be taken, it would be inequitable that interest should cease when it amounts to the same sum as the principal, if the rents and profits continue to be charged' and that in such a case the rule was excluded. Since this case the first proposition laid down in it has been settled law in all the Presidencies. (*Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose*, I. L. R., 14 C., 788; *Balkrishna Babaji* v. *Hari Govind*, *Ib.* 15 B., 84; *Ram Kanye* v. *Cally Churn Dey*, *Ib.* 21 C., 841; *Lall Behary Dutt* v. *Thacomoney Dassee*, *Ib.* 23 C., 906; *Gopal Ramchandra* v. *Gangaram Anand She*, per *Candy*, J., in *Ib.*, 20 B., 725.) The second proposition also was uniformly followed

(*Narayan* v. *Satvaji*, 9 B. H. C., 83, and cases quoted in I. L. R., 20 B., 728), until in *Shri Ganesh Dharvidar* v. *Keshavray*, I. L. R., 15 B., 625, *Telang*, J., introduced an exception to it by laying down that even where an account of rents and profits has to be taken, the *dámdupat* rule has application, if after adding interest to the principal amount advanced at the rate stipulated in the mortgage and appropriating the rents and profits received by him in or towards satisfaction of such interest, there remains interest payable on foot of the mortgage exceeding the principal. 'The ground of equity on which that rule (in *Nathubai* v. *Mulchand*) is rested does not justify a decree in favor of the mortgagee for more than double the amount actually advanced; it only prevents the rents and profits being deducted from the amount so doubled.... In truth, what the Court in *Nathubai* v, *Mulchand* spoke of, as a restriction on the application of the rule of Hindu Law, may fairly be looked upon as no restriction at all, but an enforcement of it in the form laid down in *Dhondu* v. *Narayan*. For each item of rents and profits received by the mortgagee can properly be regarded as a payment by the mortgagor and the rule of *dámdupat* as expounded in *Dhondu* v. *Narayan* places no limitation on the aggregate of such payments. It is only when the final payment comes to be made in satisfaction of the whole mortgage-debt that there is room, in such a case as the present, for the application of that rule." But a Full Bench of the Bombay High Court has recently overruled this decision as being inconsistent with the judgment in *Nathubai* v. *Mulchand* as uniformly understood and acted upon since 1868 and has laid down that the rule of *dámdupat* has no application in cases in which the terms of the mortgage necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of such account may be.

It is clear from the ancient law-givers that they intended the rule of *dámdupat* to apply to pledges and mortgages. ***Brihaspati*** says "When land or other (immoveable property) has been enjoyed, and more (than the principal debt) has accrued therefrom, then the principal and interest having been realized, the debtor shall obtain his pledge. *Yajnavalkya*":—"Whenever a debt under mortgage has become doubled by interest, then the pledge shall certainly be returned whenever double the sum lent has been

received." It is difficult to construe these texts, but they seem to mean that on no account can the creditor in possession of mortgaged lands make more than double the amount of principal out of them. But the long course of decisions in Bombay is contrary to such an interpretation and is likely to be followed by the Madras and Calcutta High Courts. But it is a matter of doubt whether they will adopt the view taken by *Telang*, J., in I. L. R., 15 B., 625, or that of the Full Bench in I. L. R., 20 B., 721. Where the mortgagee takes possession not by virtue of the deed itself, but by the power inherent in a mortgagee to take possession, the ruling in I. L. R., 20 B., 721, would not apply as the terms of the mortgage do not necessitate the existence of an account current. The rents and profits collected would be part-payments of interest within the meaning of *Dhondu* v. *Narayan*, according to the reasoning of *Telang*, J., in *Shri Ganesh Dharnidar* v. *Keshavrav*, and the ruling of that learned Judge would, it is surmised, be applicable.

Where there is a mutual, open and current account between the parties, it is a matter of doubt whether the rule of *dámdupat* will apply. Whether it is the original principal or the balance of it that the interest is held not to exceed, the application of the rule would produce much hardship.

In *Balakrishna* v. *Gopal Ramchandra*, I. L. R., 1 B., 73, the plaintiff obtained a money-decree with interest. After some years he applied for execution, when the interest payable under the decree was in excess of the principal sum and the question was whether under the *dámdupat* rule he could recover the excess. The Court held that the rule did not apply to interest recoverable in execution. In I. L. R., 14 C., 781, the rule was applied to interest both before and during the period of six months allowed for redemption, notwithstanding the form of the decree. In I. L. R., 21 C., 841, the usual mortgage decree was passed and accounts were directed to be taken. In taking the accounts, the Registrar applied the rule of *dámdupat* and accordingly issued his certificate. When the property was sold, the plaintiff applied for payment out of the sale-proceeds of the sum mentioned in the certificate with interest thereon at 6 per cent. It was held that the rule having once been applied, no further interest could be allowed notwithstanding the form of the decree. In I. L. R., 23 C., 906, the facts were the same, but the rule of *dámdupat* was not applied

in the accounts taken. It was held that the plaintiff could recover interest at 6 per cent. upon the sum mentioned in the certificate from the day fixed in it for redemption. The previous case was distinguished on the ground that there the rule had been applied before the decree became final and binding, that is, before the confirmation of the Registrar's report while in the latter the rule was not applicable at that time. But there is little authority for such a distinction which, moreover, is incompatible with *Balakrishna* v. *Gopal Ragunath* which lays down generally that the rule is inapplicable to interest subsequent to decree and does not recognise any exception. In mortgage suits where no accounts are directed to be taken, but the amount due is declared at once, the rule would apply until judgment and not later. But it is to be remembered that interest subsequent to plaint both until decree and after that is awardable under a special provision, S. 209 of the Code of Civil Procedure, and as a suit may be long pending or the Registrar's certificate may take long to be issued, without any laches on the plaintiff's part, it would be very inequitable to hold the rule applicable subsequent to plaint. For these reasons, the above decisions appear not to be beyond question.

It is clear that the rule of *dámdupat* applies when both parties are Hindus. Where one of them is not a Hindu, questions of much interest arise. In *Hakma Manji* v. *Meman Ayab Haji*, 7 B. H. C., 19, the creditor was a Hindu and the debtor a Mahomedan. The High Court remitted the case to the Small Cause Court to determine whether the rate of interest claimed did not exceed what the plaintiff was allowed to take by the Hindu law. But the question whether the Hindu law was applicable was not argued in that case. But in *Nanchand* v. *Bapu Saheb*, I. L. R., 3 B., 131, where also the creditor was a Hindu and the debtor a Mahomedan, the decree of the Lower Courts which applied the rule was reversed on the ground that the Hindu law was not applicable as the debtor was a Mahomedan. This decision was followed in *Dawood* v. *Vallabhadoss*, I. L. R., 18 B., 227, and recently in *Harilal* v. *Nagar*, I. L. R., 21 B., 38. In the converse case where a Mahomedan is the creditor and a Hindu the debtor, it has been held that the rule applies. *Ali Saheb* v. *Shabji*, I. L. R., 21 B., 85.

The law of the debtor is under these decisions the law applicable. They are all cases in Bombay and may be explained by the fact

that, under the Statute creating the Bombay Supreme Courts continued in this respect by the Charter Act, as well as Bombay Regulation IV of 1827, the law of the defendant, that is, of the debtor (*Dawood* v. *Vallubhdas*, I. L. R., 18 B., 227) is made applicable, both in the city and mofussil of Bombay. But it is very questionable whether the same principle would follow from *a priori* juridical considerations. It is very unreasonable to bind a Mahomedan creditor by a rule of a law to which he owes no allegiance; on the other hand, there is no reason why a Hindu creditor should not be held bound by his own law, although against a Mahomedan debtor, especially as the rule of *dámdupat* seems rather intended to check the creditor's rapacity than protect the debtor. The analogy of pre-emption cases between Mahomedans and Hindus leads also to the same conclusion. In *Shumsheol Nissa* v. *Zohra Beebee*, 6 N. W. H. C., 2, it was held by a Full Bench that though the Mahomedan law relating to gifts, pre-emption, etc., was not expressly made applicable by the Bengal Civil Courts Act, yet justice, equity and good conscience required that it should be applied in all such matters as between Mahomedans, *Stuart*, C. J., expressly observing that it would not apply where one of the parties was a non-Mahomedan. Where a Mahomedan and a Hindu were co-sharers of an estate and the Hindu sold to another Mahomedan, it was held that no right of pre-emption arose to the vendor's co-sharer. 'It is essential that the vendor should be subject to the rule of the law.' *Dwarka Das* v. *Husain Bakhsh*, I. L. R., 1 A., 564, following *Poorna Singh* v. *Hurrychurn*, 10 B. L. R., 117. Whether a Hindu vendee from one of two Mahomedan co-parceners is bound by the law of pre-emption, has been answered in the negative by the Calcutta High Court and in the affirmative by the Allahabad High Court. *Peacock*, C.J., and *Kemp* and *Mitter*, J. J., proceeded upon the broad ground that a Hindu is not bound by the Mahomedan law unless the latter created a defect in the title of the Mahomedan vendor which they held it did not. *Norman* and *Macpherson*, J. J., who dissented did not question the former proposition but proceeded upon a different view of the law of pre-emption, *Sheikh Kudratulla* v. *Mahini Mohan*, 4 B. L. R., F. B., 134. The judgment of the Allahabad High Court also proceeded upon a similar view of the law of pre-emption. *Gobind Dayal* v. *Inayatullah*, I. L. R., 7 A., 775. The effect of these cases is that where one of the parties is a Hindu and the other a Mahomedan,

the Mahomedan or Hindu law shall not be applied to the Hindu or Mahomedan respectively so as to deprive him of any right which he would otherwise have had—a principle embodied in a proviso to the Bengal Civil Courts Act, VI of 1873. I am not aware of any case in which the question was decided whether a Hindu co-sharer of a Mahomedan could claim the benefit of pre-emption as against the latter's vendee *being* a Mahomedan. It may be conjectured that he cannot inasmuch as the Mahomedan law of pre-emption is intended for the pre-emptor's benefit and probably did not contemplate its being taken advantage of by other than a Mahomedan, differing in this respect, as we have seen, from the rule of *dámdupat*.

Two recent cases in the Bombay High Court, previously referred to, decide what legal effects flow from the transfer of the equity of redemption of a mortgage from a Mahomedan to a Hindu and *vice versâ*. In the first of these cases, I. L. R., 21 B., 38, *A*, a Mahomedan, mortgaged his land to *B*, a Hindu, and afterwards assigned the equity of redemption to *C*, a Hindu. Prior to the transfer, interest exceeding the principal had accumulated. *C* contended that as a Hindu he was not bound to pay interest more than the principal. The Court held that, *as during the Mahomedan's time*, the land had lawfully become charged with the principal and full amount of interest, it could not be freed from it by a subsequent assignment. On the question whether the creditor was entitled to interest subsequent to the assignment, the Court expressed no opinion. In the other case, I. L. R., 21 B., 85, *A*, a Hindu, mortgaged his property to *B*, a Mahomedan, and after some time *A's* equity of redemption was transferred to *C*, a Mahomedan, by a Court sale. It was held that so long as the mortgagor was a Hindu the law of *dámdupat* applied and interest ceased when it became equal to the principal; but when a Mahomedan became the debtor, the rule no longer applied and interest began to run again from the date of the purchase. The same principles would be applicable when the governing law is taken to be the creditor's, instead of, as in these cases, the debtor's.

In the early years of the English rule, the Hindu law rule restricting the rate of interest as also that of *dámdupat* seem to have been in full force. For we see in all the Presidencies Regulations passed enacting that stipulated rates of interest shall be paid,

In Bengal, Regulation XV of 1793, and in Madras, Regulation XXXIV of 1802, enacted that all stipulated rates of interest shall be paid, but that no creditor shall be able to recover a sum for interest in excess of the principal. It should be borne in mind that both these rules applied to all persons whether Hindus or not and whether contracting in Calcutta or outside it. In Bombay, Regulation V of 1827 enacted a similar rule with regard to rate of interest with the proviso that the Hindu law rule of *dámdupat* shall be maintained in all applicable cases. It will be noted that while in Bengal and Madras the *dámdupat* was enforced as a statutary rule binding on all, in Bombay it was left to be enforced as part of the Hindu law. Then came Act XXVIII of 1855. This repealed all these Regulations and enacted that stipulated rates of interest shall be paid in all cases. Nothing was said about *dámdupat*. Two questions then arose :—(1) Whether Act XXVIII of 1855 by repealing the old Regulations had restored the Hindu law rule regarding rate of interest and was to be taken subject to it; (2) Whether the rule of *dámdupat* has been abrogated even as a rule of Hindu law by the repeal of the old Regulations or by the provisions of Act XXVIII of 1855. In 7 B. H. C., 19, the first question was answered in the affirmative and the same view was taken in *Ram Lall* v. *Haran Chandra*, 3 B. L. R., O. C., 130, by *Peacock*, C. J., but in *Mia Khan* v. *Bibi Bibijan*, 5 B. L. R., 500, the correctness of this view was doubted by *Phear*, J. It may be doubted whether the view taken by *Phear*, J., is not the more correct one, inasmuch as the words of the Act lay down clearly that all stipulations as to rate of interest shall be carried out.

The question of *dámdupat* stands on a different footing. Act XXVIII of 1855 by repealing the statutary *dámdupat* rule in the Madras and Bengal Regulations has the effect of restoring the Hindu law on the subject. In the Bombay Regulation, the *dámdupat* rule was not erected into a statutary rule but was left to be maintained, notwithstanding anything contained in it, as a rule of Hindu law, and therefore was not affected by its repeal, according to the well-known rule of interpretation that the exceptions to a general rule are not affected by the repeal of the latter, unless expressly provided. Nor is the rule itself incompatible with the provisions of Act XXVIII of 1855 which only deals with rates of interest. It has

therefore been held in several cases that notwithstanding that Act the rule of *dámdupat* is enforceable as a rule of Hindu law. 3 Bom., A. C. 11, 23, I. L. R., 5 C., 867, *Ib.* 14 C., 788.

The next question is, in what places or in what Courts is the Hindu law of *dámdupat* applicable? By the Charters of the old Supreme Courts of which the Calcutta, Bombay and Madras High Courts are the successors, it was ordained that they should administer the Hindu law among Hindus and the Mahomedan law among Mahomedans in all matters of contract. The Charters of these High Courts provided that they should administer the same law in their original jurisdiction as the Supreme Courts would have done unless otherwise provided. The rule of *dámdupat,* therefore, prevails in these Courts when exercising their original jurisdiction. It is also applicable in the Presidency Small Cause Courts and the Madras City Civil Court, as S. 16 of Act XV of 1882 and S. 8 of Act VII of 1892 require that these Courts shall administer the same law as the High Court in its original jurisdiction.

In the mofussil, by the Bengal Civil Courts Act, Act XII of 1887, applicable to the mofussil of Bengal and the North-Western Provinces, and the Madras Civil Courts Act, Act III of 1873, it is provided that the Hindu and Mahomedan laws shall be applicable in matters of succession, inheritance, marriage, or caste or any religious usage or institution, where the parties are Hindus or Mahomedans respectively, except in so far as such law has been altered, or abolished by legislation. In cases not provided for by the preceding part of the section, or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience. *Contracts* are thus not a subject on which the Hindu and Mahomedan laws are applicable. Nor has the rule of *dámdupat* been applied by the usage of the Courts, as being consonant with justice, equity and good conscience, in like manner with the native laws of gifts, pre-emption, etc., 6 N. W. H. C. 2 and 28. In 6 M. H. C., 400, *Holloway* and *Kindersley,* J.J., said "As to the Hindu Law, it is not binding as law upon such matters in the mofussil." The same view was taken in *Deen Doyal Poramanick* v. *Kylas Chunder,* I. L. R., 1 C., 92; *Het Narain* v. *Ram Dein, Ib.* 9 C., 871; *Surjya Narain* v. *Sirdhary Lall,* 825. The same remark applies to the rest of British India, with the exception of the Bombay Presidency.

In the mofussil of Bombay alone, this doctrine is held applicable. In I. L. R., 9 C., 829, *Prinsep*, J., pointed out this difference and explained it by a difference in the Regulations in that Presidency, under the proviso to Regulation V of 1827 that the Hindu law rule of *dámdupat* should be maintained in all applicable cases, the practice grew up of applying it in all cases where the parties were Hindus. Moreover, by Bombay Regulation IV of 1827, a Regulation which still remains in force in this respect, the law which the Courts in the mofussil were to administer was enacted to be "the Acts of Parliament and Regulations of Government applicable to the case; and in the absence of such Acts and Regulations, the usage of the country in which the suit arose: if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity and good conscience." The Hindu law of contracts in general, therefore, and of *dámdupat* in particular, is, therefore, applicable in the Presidency of Bombay, as the law of the 'defendant' under this Regulation. And Regulation V of 1827 coming after this Regulation and directing that the rule of *dámdupat* shall be maintained in all applicable cases, amounts to a clear legislative direction that it shall be applied when the parties are Hindus.

It only now remains to note the effect, if any, of the Indian Contract Act upon the rule. If the rule is consistent with that Act, it is clear, it is not affected by it. In I. L. R., 5 C., 867, it was held that the rule did not make a contract invalid or illegal, but operated only as a rule of limitation compelling the creditor to seek his remedy within a certain time and that it was, therefore, not inconsistent with the Act. And the practice of the Courts of applying the rule, without reference to the Contract Act, speaks to the general prevalence of a similar impression, since as will be presently shown, if it is inconsistent with the Act, it is totally repealed by it. But it may be questioned whether if the rule is one of limitation merely, it is not abrogated like all other Hindu rules of procedure, and whether it is not incompatible with S. 37 of the Contract Act, which provides that the parties to a contract must either perform or offer to perform their respective promises. Now if the rule should be deemed inconsistent with the Act, is it repealed by it? The last clause of S. 1 of the Act enacts that the Act shall not affect the provisions of any Statute, Act or

Regulation not thereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of the Act. The words 'not inconsistent' have been held to apply to 'usage or custom,' and while in Bombay the words 'usage or custom' have been interpreted to mean both a general usage pervading all trades as well as a special usage governing a particular class of contracts. In Calcutta they have been taken to refer only to general usages common to all trades. Whichever view, therefore, may be taken, since *dámdupat* is a general usage, it must be taken to be repealed as a usage by the Contract Act. In the Presidency towns, as we have seen, the rule is applicable by virtue of the Charters of the High Courts which directed them to administer, until otherwise provided, the same laws in their original jurisdiction which the Supreme Courts would have done. As the Contract Act applies to the whole of British India, including the Presidency towns, it is to be inferred that it 'provides otherwise' within the meaning of the Charter Acts and that without affecting any of their provisions. In this view it is unnecessary to consider whether the words 'not inconsistent' apply to 'Statute, Act or Regulation.' The result, therefore, is that if the rule of *dámdupat* is inconsistent with the Contract Act, it is entirely repealed by it.

The Usury laws have in most civilized countries been weighed in the balance and found wanting. And yet this law remains in force, the relic of a bygone civilization of thirty centuries ago. Under it, there is one rule within the Presidency towns and another outside them. It is also a law which changes not with the *locus contractus* but with the *forum*, contrary to all sound principles of jurisprudence. The rule must be done away with altogether, or if it cannot be, may be made universal throughout India but to leave it as it is, anomalous, ill-defined and undeveloped, applicable only among a class of people and in a set of tribunals, is altogether undesirable.

M. A. TIRUNARAYANACHARIAR.

TRANSLATED FROM VAIDYANATHA DHIKSHITIYAM.

Qualifications of the Bridegroom.

(1). On this subject, *Manu* says: "An intelligent man should marry his daughter before she attains her age to a highborn, handsome and worthy bridegroom." (2) *Yama* says "The wise should

give their girls after fully considering the seven good points in the bridegroom, *viz.*, lineage, behaviour, physique, age, attainments, means and the existence of guardians. The rest should not be thought of." (3) But *Vishnu* says "The family of a Brahmin must be accepted and not learning or wealth in the matter of the daughters and in ceremonies. Learning does not count there as a chief ground." *Commentary.*—This is said to show that lineage is the most important consideration, but not to deny the importance of learning. (4) Therefore it is that *Aswalāyana* says: "Examine the lineage first." (5) *Apastamba* says: "The qualifications of the bridegroom are his having good relatives, being well-behaved and handsome, having a knowledge of *Srutis* and being free from disease." (6) *Gautama* says "Let him give to one having good attainments, character, relatives and disposition." (7) *Satātapa* says "A bridegroom, mendicant, born of a good family, well-behaved, handsome, intelligent, learned and young must be secured." (8) *Yajnavalkya* says "The bridegroom must possess good qualities, must be of good caste, learned in the Vedas, young, intelligent and social and must have been well ascertained on examination to have virile power." (9) *Katyayana* also says:—"Women have been created to bear children. They supply the soil and men the seed. The soil must be given to one having the seed. Let, therefore, the seed be well examined." (10) *Narada* thus says how it should be examined. "He whose semen virile floats on water and whose urine is noisy and frothy is proved by these tests to be a man. If he does not answer these tests he is impotent. Fourteen sorts of eunuchs are recognised by the wise in the *Sastras.*" *Commentary.*—These are (1) One who has no scrotum from birth. (2) One whose scrotum is split into two. (3) One who could cohabit once with a woman if he has not cohabited with a woman for fifteen days previously. (4) One who has lost his masculine power by the curse of his preceptor. (5) By disease. (6) By the wrath of the Gods. (7) One whose potency is roused only by jealousy. (8) One whose potency is roused only by repeated amorous attentions of women. (9) One whose semen is windy. (10) One who always talks of his potency without approaching a woman. (11) One who has lost his potency by controlling his passions. (12) One who is incompetent to impregnate. (13) One who either through cowardice or confusion loses his virile power; and. (14) One who

exhibits his masculine power in the case of other women than his own wife. (11) The first two being incurable and the third should be rejected. The next three should be allowed a probation of one year. The next four of those defined should be discarded like sinners, even by women who have already had sexual intercourse. Even though a woman had married either of the next two, she is allowed to marry another husband after trying her husband for six months. The next in order may improve by cohabitation with a bold woman. Let his young wife advise her weak husband in secret. She who has married one who has masculine power in the case of another woman but herself, may marry another husband. This is a rule propounded by *Prājāpati*. *Commentary.*—What is here said about marrying another husband applies only to other *Yugas*, the re-marriage of women in the *Kali Yuga* being forbidden by the *Srutis*. (12) *Kātyāyana* says :—"The lunatic, the sinner, the leper, the eunuch, one of the same *gotra*, the blind and deaf, the epileptic, these are said to be bad husbands. The faults in the bridegroom have already been described. The intelligent should not give their daughters to men who are living at a great distance, who have no learning, who are treading the path to emancipation, who are valiant and who are poor." (13) We find in *Apararca* "Unworthiness, peevishness, cruelty and absence of *Karma* show a man in this world to be of bad parentage." Here ends the description of the qualifications of the bridegroom.

The Time for Marriage.

(1) On this point, *Bodhayana* says: "Let a man give his daughter to a bachelor of good qualities while she is a *Nagnika*. Let him not give his daughter to one devoid of good qualities although she be a *Rajaswala*." (2) *Vasishta* says: "The father must marry his daughter while she is a *Nagnika* lest she attain her age. If she be not married when she comes of age, the sin attaches to the father" (3) The same author thus defines a *Nagnika*: "So long as a girl does not feel ashamed in the presence of males and cover her naked limbs, so long she is a *Nagnika*. So long as she does not wear a cloth, so long as she plays in the dust, so long as she thinks no harm, so long is she a *Nagnika*." (4) *Samvarta* says : "So long as a girl does not feel shame, so long as she plays in the dust, so long as she stands in the way of the cattle, within that

time should the girl be married. At eight years of age she is called a *Gouri*; at nine, a *Rohini*; at ten, a *Kanya*; and after that a *Rajaswala*." *Commentary*.—That she becomes afterwards a *Rajaswala* has reference to cases occasionally occurring; for menstruation does not in all cases occur at that age. (5) Therefore it is that the same author says: "A father who does not marry his daughter, even when arrived at the age of twelve, becomes a sinner. The mother, the father and the elder brother, they three go to hell, who see their *Rajaswala* daughter unmarried. He who gives a *Gouri* in marriage goes to heaven. He who gives a *Rohini* in marriage goes to *Vaikunta*. He who gives a *Kanya* in marriage goes to *Brahmaloka*. He who gives a *Rajaswala* in marriage goes to a hell named *Rourava*. Let a man therefore give his daughter in marriage before she attains puberty. The marriage of a girl of eight years of age is highly commendable." (6) *Yama* says: "At eight years of age, a girl is called a *Gouri*; at nine, a *Nagnika*; at ten, a *Kanyaka*; at twelve, a *Rajaswala*." (7) *Devala* says: "A barren woman is one kind of *Vrishali*; the mother of still-born children is another and the third is an unmarried girl in whom menstruation has commenced." (8) *Apastamba* says: "A girl of eight years of age is a *Gouri*; of nine a *Rohini*; of ten, a *Kanya* and older than that, a *Rajaswala*. When arrived at the twelfth year women begin to menstruate." *Commentary*.—It means that it is mostly so. It does not necessarily mean that girls certainly begin to menstruate at twelve; for in the case of some, menstruation is seen to begin even earlier. (9) Therefore it is that *Yama* and *Samvarta* say: "At ten a girl is called *Kanya*; and afterwards, a *Rajaswala*." *Commentary*.—It is thus clearly settled that so long as menstruation does not begin, a girl continues to be a *Kanya*. (10) It is only therefore that *Yama* says: "Let a man see a girl married before she begins to menstruate." (11) *Manu* also says: "A man of thirty years may marry a handsome girl of twelve." *Commentary*.—This text applies to cases where menstruation has not begun. (12) It is only therefore that *Brihaspati* says: "When an unmarried girl living in her father's home begins to menstruate, her father becomes guilty of causing abortion and she becomes a *Vrishali* according to the *Smritis*. A Brahmin who, stupefied by passion, marries such a girl becomes the husband of a *Vrishali*, unfit to talk with and eat with. A Brahmin who, stupe-

fied by passion, marries a *Vrishali* undergoes continual pollution as if he murdered a Brahmin every day. If he co-habits with a *Vrishali* for a single night he must expiate his sin by begging his bread and repeating mantras for the space of three years. He who cohabits with a *Vrishali* continually for one month becomes degraded in the present birth to the status of a Sudra and dying is re-born a dog." (13) *Nārada* says: "He who does not give a girl in marriage before she menstruates is guilty of causing an abortion every time that she menstruates before marriage." (14) *Yājnavalkya* also says: "Not giving her in marriage, he becomes guilty of causing abortion when she menstruates." (15) *Vyāghrapāda* says: "There is a time fixed as appropriate for the marriage of women. *Manu* has enjoined marriage in the case of women, in the place of *Upanayana*." (16) *Yama* says: "*Brahma* said that the marriage of women is their *Upanayana*. Therefore the eighth year from conception or the eighth year from birth is preferable. If, owing to bad times or bad state of the country, there is a fear of being driven to contract an unlawful marriage, a girl may be given in marriage even while she is a *Nagnika*, if a proper match is available. Even where the girl is a mere child, if a bridegroom full of good qualities is available, let a man give her in marriage, though before the proper time, for fear that the state of the country and the times may change." (17) Having thus recognised infant marriage, *Prājāpati* thus lays down a special rule of obsequies in such cases: "If a girl married before she is two years of age dies, the corpse should not be buried, but obsequies should be performed with mantras." (18) *Manu*, however, says: "Let the girl though menstruating remain in her parents' house unmarried till her death but let not one give her in marriage under any circumstances to one devoid of good qualities." *Commentary*.—This is simply intended to prohibit her being married to one devoid of good qualities where one of good qualities is available and not to prohibit her being given in marriage at all events to one devoid of good qualities. (19) So also in respect of what *Yama* and *Bodhāyana* say: "Let a man give, as his means would permit, his *Nagnika* daughter in marriage to one having good qualities; but let him not give even his *Rajaswala* daughter to one devoid of good qualities. When the father does not give his daughter in marriage, though come of age, the girl herself should seek a proper husband." Thus

says *Yama*: "Where a girl is not given in marriage even at her twelfth year and remains in the house, her father is guilty of the sin of causing abortion, and the girl should herself seek a husband." *Commentary.*—This seeking of the husband must be after three years from her first menstruation. (21) *Bodhāyana* also says thus: "He who does not give in marriage a girl who has been menstruating for three years is certainly liable to a sin equivalent to that of causing abortion. This is so where none has asked for her; but if she had been asked for, he suffers every time that she menstruates as much sin as is equivalent to that of causing abortion." This is what *Manu* said: "She must await the command of her father for three years after menstruation commences, and in the fourth year seek herself a proper husband; and if a proper husband is not available, she should wed herself even to one devoid of good qualities." (22) *Manu* also says: "A good girl must wait three years after menstruation, and after that time should herself seek a proper husband." It is also said: "If a girl not being given in marriage finds herself a husband, she commits no sin, nor he whom she marries. A girl who seeks her own husband should not take jewelry belonging to the father or the mother or given her by the brother. If she takes it, it is theft. He who marries a girl who has attained her age should not give any bride-price to her father; for her father who had seen her menstruate before she was married has forfeited all right in her." Here ends the dissertation on the time for marriage.

On Those Who are Competent to Give a Girl in Marriage.

(1) On this subject, *Yajnavalkya* says: "Of the father, the paternal grandfather, the brother, the *sakulyas* and the mother, the one subsequently named is, in the absence of those previously named, and if not disqualified, competent to give the girl, and if he does not give her, he suffers the sin of causing abortion at every one of her menstruations. In the absence of anybody to give her the girl herself should seek a proper husband." *Commentary*—'Of father,' etc., the one succeeding is, in the absence of the one preceding, competent to give the girl in marriage. 'If not disqualified' means 'if not suffering from lunacy, and the like disqualifications.' Therefore, he who being competent does not give her, suffers the sin of causing abortion at every menstrua-

tion. Where, however, there is nobody to give, the girl herself must seek a proper husband having the necessary qualifications. This is the purport. (2) *Narada* says : " Let the father himself give his daughter in marriage, or the brother with the father's consent; so also the maternal grandfather, the maternal uncle, the members of their family, or other relatives. Let the mother give her daughter in marriage in the absence of all of these, and if she keeps her virtue. If she is disqualified, let the men of her caste give her daughter in marriage. If there is nobody at all to give, let the girl go to the king, and with his permission find for herself a proper husband, one of her own caste and worthy of her in respect of family, character, affluence and Vedic learning. Let her practise virtue with him and beget sons of him. Though a man otherwise independent does a right thing while not suffering from some disqualification, the thing is supposed not to be done, because he was, in respect of it, not independent." (4) *Manu* says : " To whomsoever the father or the brother with his consent gives a girl in marriage, let the girl serve him while alive and be true to him even after his death." *Commentary.*—This text is intended to show the preferential right of the father and the brother and not to prohibit others from giving the girl in marriage. So much about persons competent to give a girl in marriage.

On Supersession Of Wives.

(1) On this subject, *Manu* says : " A wife who drinks wine, whose conduct is unbearable, who acts adversely to her husband, who is suffering from disease and who is always mischievous and prodigal should be superseded. A barren woman should be superseded at the eighth year; the mother of still-born children, at the tenth and the mother of female issue alone, at the eleventh. But a wife that talks unkindly should be immediately superseded. A wife who though sickly, is agreeable and well-behaved may be superseded with her own consent, but should never be disrespected. A woman who, on being superseded, leaves her husband's home, should immediately be prevented from doing so. She must be sent to her father's house or dismissed in the presence of all the family." (2) *Yajnavalkya* says : " A wife who drinks wine, who is diseased, fraudulent, barren, prodigal, harsh in language, bearing only female issue and hateful of her husband should be superseded. A woman

is said to be superseded when her husband marries another while she is living in the house." *Commentary.*—A wife who has been superseded should be supported (by her husband). Otherwise a great sin will be committed. Where the husband and the wife are agreeable to each other, there thrives the threefold object of human existence. A man who abandons his wife who is obedient to his commands, clever, mother of valorous sons and agreeable in her speech must be made to give her a third portion; but if poor, he must be compelled to maintain her. *Commentary.*—'Abandons' means 'supersedes.' 'A third portion' means 'a third of his property.' 'Maintain her' means 'give her food and raiment.' (3) *Parasara Madhaviya* says; "A man should abandon for the protection of his own virtue a wife who obstructs the practice of virtue, who is ill-behaved, irascible and harsh in language." *Commentary.*—'Abandon' means 'supersede.' (4) *Daksha* says: 'The first wife inures for the performance of virtue and the second, for the gratification of passion. The latter yields him all sexual pleasure, but no future bliss.' (5) *Smritiratna* says: "He who out of passion would supersede his wife and wishes to marry another must first cleverly propitiate his first wife with wealth and then marry another." (6) *Bodhayana* says: "A man should abandon a barren woman at the tenth year, the mother of female issue alone at the twelfth, and the mother of still-born children at the fifteenth; but a harsh-tongued woman immediately." (7) *Apastamba* says: "Let not a man marry a second wife where the first is virtuous and has borne children. In the absence of either, he must take fire from the first." *Commentary.*—'Virtuous' means 'zealous in the performance of *Srouta* and *Smarta* rites': when she is a mother and has children. When the wife has both these qualifications, he should not marry another; but when she has not either of these—virtue or children—a second wife may be married, because the text says, 'even while she is living, etc.' If she dies, he may marry a second wife subsequently with the sacrificial fire taken from her. Even if he had male issue by the first wife he may marry a second wife for the practice of virtue. (8) *Satatapa* says: "Where the wife is addicted to drinking wine, is suffering from a chronic disease, is deceitful or childless or bearing only female issue or given to scolding or prodigal or hateful of her husband, he may marry another even while she lives." (9) Another *Smriti*

says : " Where a wife is sickly or prolific of female issue or barren or insane or past menstruation, she may be, if not wicked, excluded from her husband's bed, but not from participating in the performance of virtue." (10) *Garga* says : " A house-holder should have only one wife. He may marry another for the gratification of passion; but he should never marry a third though he may even marry a fourth."

On the Order of Persons Bound to Perform the Funeral Rites of the Deceased.

Sumantu thus mentions the persons bound to perform the funeral rites, such as cremation, etc. "The *aurasa* son should zealously perform the obsequial rites of his deceased mother and father with proper mantras." *Jamadagni* thus lays down the manner of performing the obsequies when the son is unable to perform them. "The offering of rice-balls and libations of water to the deceased father must be performed by the son. Even if unable, the son must do the cremation, and somebody else must complete the rest." If there be a number of *aurasa* sons, the eldest alone should perform the obsequial rites of the father. " Whatever is done by the eldest, not divided in respect of property, with the consent of all the rest shall be deemed to be done by all of them." So says the text. Another *Smriti* says : "The *Navashraddhas*, the *Sapindikarana* and the *Shodasa Shraddhas* must all be performed by one and the same person, although they are all divided from one another." The *Chandrika* says : " The *aurasa* son alone should do the cremation, etc. Where the sons are many, the best of them in quality should do it; but if of the same quality, the eldest alone should do it." But *Rishyasringa* says: "Of the sons, whoever is the most beloved of the father, whether he be intermediate, youngest or eldest, all (funeral rites) must be done by him alone. Where all the sons were hated by their deceased father, his wife, the brother, the daughter, even a friend, etc., should perform the cremation and other funeral rites of the deceased."

Jamadagni says:—" The cremation, the offering of rice-balls and the libations of water must be performed by the eldest son. If unable to do them himself, he must have them all done by another." *Commentary.*—If the eldest of all the sons is unable or not near at

hand, the eldest among the sons present at the spot must do all these; for the *Srutis* say : 'The eldest by birth must perform the father's obsequies.' Some say that the expression 'eldest by birth' bears a different construction. 'If there are a number of sons born of different mothers, he alone who is the eldest by birth must perform the father's obsequies and not the son of the first wife; for all texts contain the expression 'eldest by birth.' Manu says: "Of the sons and especially those born of wives of the same caste, the fact who is the eldest is determined with regard to the time of birth and not to the order of their mothers. Even the holy books call him eldest, who is born first."

Another *Smriti*, however, says: "Whether the eldest or the youngest, the son of the first wife should perform the cremation of the (father's) corpse. As cremation is the most important of the rites, the son of the first wife should be held the eldest." Another *Smriti* says: "If a person has two wives and sons, the same man should perform the obsequies of both. In the event of the death of the father, the son of the first wife should be regarded as the eldest son." *Commentary.*—The expression 'the son of the first wife' means 'the son of the wife highest in rank, *i.e.*, the son of the wife of the same caste;' for, otherwise, there will be a conflict with the text of *Manu* 'Of sons of the wives of the same caste, etc.' Accordingly *Bodhāyana* also says that the son born of the wife of the same caste is alone competent to discharge the obligation incurred by his father, etc. "Let a man, having controlled his senses, beget children on wives of his own caste. Having propitiated the Rishis by studying the Vedas, Indra, by sacrifice, and the manes, by his sons, he rejoices in Heaven freed from all obligation." *Commentary.*—The eldest *aurasa* son by another wife should perform the obsequies of the father alone and not that of his step-mother, being born of another womb. The son, though the youngest, must himself perform the obsequies of his own mother; for the *Smriti* says: 'The *aurasa* and the *kshetraja* sons must perform the obsequies of their mother and in their absence, sons born of her co-wife.'

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The *Smritiratna* says that, even where there is a son by a co-wife, the husband alone should perform the cremation and other

rites. "Where of wives of the same husband, one dies sonless, the husband alone should perform the funeral rites even where another wife has male issue. In the absence of the husband, the son by the co-wife is certainly bound (to perform the rites), and in his absence, his sons, and of them the one present at the spot is preferred to those absent." *Commentary.*—This rule of preferring the husband to the son of a co-wife applies to cases where there is *stridhana* to be inherited. Otherwise, it is said, the son of a co-wife alone should perform the funeral rites. In the matter of inheritance, *Manu* says: "Where the marriage is of the *Brāmha*, the *Daiva*, the *Ārsha*, the *Gāndharva* or the *Prājāpatya* form and the woman dies childless, the husband alone takes her property." *Yājnavalkya* also says: "The *stridhana* of a childless woman goes to her husband where she has been married in the first four forms, such as *Brāmha*, etc. If married in the other four forms, it goes to the husband where he has only daughters." *Commentary.*—*Kātyāyana* says that where the marriage has been in the *Āsura* and the following forms, and where there is no property to be inherited, the son of the co-wife is the first to perform the rites. "The *aurasa* son must perform the funeral rites of his own mother, and in his absence, the son of the co-wife and other sons, *kshetraja*, etc. In the absence of them all, the husband and in his absence, the *sapindas* must perform the funeral rites of the deceased woman." Another *Smriti* says: "The son of the co-wife, the *kshetraja* son, other sons, and the husband should perform the funeral rites of the deceased sonless woman, every one in the absence of all mentioned before him." *Manu* also says: "If, among several wives of the same man, one is the mother of a son, then according to *Manu*, all these wives are mothers by that son." *Brihaspati* also says: "This is the rule in respect of several wives of the same husband—if among them, one is the mother of a son, that son is the giver of the *pinda* to them all." *Gautama* also says: 'All the wives of the father are mothers.' *Commentary.*—Some maintain that the texts, 'Though another has a son, still the husband alone should perform the obsequies,' etc., apply in the case of a wife of a different caste and that the texts, 'the *aurasa* son born of her should perform,' etc., are intended to show that the son of the co-wife should be preferred and apply in the case of wives of the same caste. Others on the other

hand contend that, as there is no clear and direct authority upon this point, the determination of the order must depend, according to the text, 'he should perform who takes the property,' on the fact of inheriting property or otherwise. Others yet contend that, as the text, '*Aputrava*,' etc., applies only to cases of women having no issue of their own, and that there is no reason for preferring the son of the co-wife while there are grandsons, etc., of the deceased woman entitled to take her property, considering the *Smriti* which says that he who takes the property is the giver of the *pinda* to the deceased. This is said also in another *Smriti*. "Although the co-wife has a son, the husband should perform the funeral rites of his sonless wife. In the absence of the daughter's son and the husband, the son of the co-wife should perform them." *Commentary*.—The meaning of this is that in the absence of the husband and the daughter's son, who would inherit her property, the son of the co-wife should perform them. This rule applies where there has been a partition. If undivided, the son of the co-wife certainly takes precedence over the daughter's son. In the absence of the son, etc., the husband should perform the wife's obsequies; and in his absence, the daughter. On this point *Sankha* says: "In the absence of sons, the husband and the wife should each perform the other's obsequies. Where one has a daughter but no son, she alone should give the *pinda*." *Commentary*.—The meaning is that in the absence of the husband, the daughter should perform the mother's obsequies; and in the absence of the wife, the daughter should perform the father's obsequies. The daughter's right to inherit her father's property is thus spoken of by *Devala*: "The daughter virtuously begotten inherits, like the son, the property of her sonless father." *Commentary*.—The daughter, married and unmarried; another *Smriti* says: "As is one's self, so is one's son. The daughter is equal to the son. While she, his *Atman*, lives, how can another take his wealth?" On this point, some contend that from the *Smriti* which says: "The son must perform the father's *shraddha*, and in his absence, the wife, next, the daughter's son who takes the property, and after him, the brother and his son," and from the order of persons entitled to inherit laid down in the *Smriti* "The wife and the daughter, the parents and the brothers accordingly," the wife and the daughter take precedence over the daughter's son. But others maintain that the daughter's son

takes precedence over the wife and the daughter, on the strength of *Vishnu Smriti* which says that the daughter's sons should be regarded as son's sons and on the strength of custom observed by wise men. In the absence of the daughter, the brother, etc., is the performer (of the obsequies). "The brother born of the same mother and his sons should perform the obsequies of the deceased brother. In the absence of these, the brother born of a different mother and in his absence, his son should perform the same." Another *Smriti* says: "Of the wife, the brother, his son, the father, the mother, the daughter-in-law, the sister, the nephew, the *sapindas* and the *sodakas*, the one subsequently named is, in the absence of all previously named, according to the *Srutis*, the giver of the *pinda*." *Vishnu Purana* also says: "The son, the brother, his son, the wife, the mother, the father, and the disciple, even in the absence of property, should perform the funeral rites of the deceased." However, a text of *Manu* says, that if among several brothers of the whole blood, one has a son, then all those brothers are, according to *Manu*, fathers by virtue of that son. This text has been commented upon by *Vijnaneswara* and others, as laying down, not that the brother's son takes precedence over the brother, but that while there are sons of brothers none else should be adopted as a son. Some contend that on the strength of *Kātyāyana's* text: "Of the sonless man, his wife of good family or daughters, and in their absence the father, the mother, the brother and his sons are mentioned (as heirs)," and of the *Smriti* laying down the order of heirs as 'the wife, the daughters, the parents and the brothers,' the parents take precedence over brothers, etc. Others maintain on the strength of a number of texts already cited, such as 'the wife, the brother, his son, the father, the mother,' etc., the brothers, etc., are entitled to precedence over the parents. But there is the text of *Bodhāyana*, which says: "Neither the mother nor the father should perform the funeral rites of the son. Nor the elder of several brothers, the funeral rites of the younger." There is also the text of *Kātyāyana* which says: 'The father should under no circumstances perform the *shraddha* of his sons; nor the elder brother, of his younger brothers." Another *Smriti* also says: "The father should not perform the *shraddha* of the son, nor the elder brother, of the younger." All these texts

apply to cases where the person primarily bound to perform the *shraddha* such as the son, the younger brother, etc., is alive; or they may apply also to cases where the person so bound to perform bears no good will to the deceased. Accordingly *Bodhāyana* and *Devala* say: "The funeral rites of the father must be performed by the son, and of the brother, by the younger. The sister's sons may also perform the funeral rites of the maternal uncle dying without male issue. The father should not perform the funeral rites of the son, nor the elder brother, of the younger. If they do it out of affection they may do all but the *Sapindikarana* rite." The *Sangrahakara* says that if there be nobody else to perform, (even this *Sapindikarana*) should be performed by them. "In the absence of any one else, even the father, the mother and the elder brother should perform the *Sapindikarana.*"

Another *Smriti* also says: "In the absence of all others even the father or even the elder brother should perform the obsequies. The elder brother should do so especially at Gaya." The *Smriti sarasamuchchaya* thus lays down the sin attaching to the omission so to perform. "The father, the elder brother or even the mother must perform the funeral rites of a person who died leaving no other relatives. Otherwise great sin will be the result." This indicates that where the father and the elder brother are both alive, the father being the nearer must perform the funeral rites and in his absence, the younger brother. When there are many younger brothers, of the deceased, the next younger brother and not one more remote should perform the funeral rites; for *Manu* and others say "He who is the nearest *Sapinda*, etc." The *Smritiratna* says that while the father is alive one should have the obsequies of brothers etc., performed by some other person. "The rites in reference to the dead body, the *Sapindikarana* and the anniversary of the brother, etc., must be performed by some other while one's father is alive." The order accordingly is:—the father and the mother in the absence of the brother and his son, the daughter-in-law in the absence of the mother and the father; in her absence, the sister, younger or elder; in their absence, their sons; in the absence of the sister by the same mother, the sister by a different mother; in her absence, her son; next the *Sapindas*; next the *Samanodakas*; after them the *Sapindas* of the mother; after them

the *Samanodakas* of the mother; in their absence, the *Sagotras*; next the disciple; in his absence, the *Ritvik;* after him, the preceptor; in his absence, the son-in-law, and in his absence, a friend.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Kondaiya Chetti *v.* Narasimhulu Chetti, I. L. R., 20 M., 97.

This case raised a rather difficult question of agency. An owner of goods who consigned them for sale to an agent in London authorized him to sell the goods at the best price obtainable without reference to the owner and gave him full discretion and power to act to the best of his judgment in the matter of the sale. The agent had made advances on the goods and was authorized to pay himself from the sale-proceeds and to draw on the owner for any shortfall. The owner subsequently fixed certain limits of price but the goods were sold by the agent below the limits and the owner was sued for a shortfall. The question was whether the consignor could after giving to the agent authority to sell to the best of his judgment afterwards impose a limit of price. *Subrahmanya Aiyar*, J., held on the authority of *Smart* v. *Saunders*, 3 C. B. 400, 401 and *Decomas* v. *Prost*, 3 M. P. C. (N. S.) 158 that the authority did not become irrevocable by reason of the advances and that the factor must make out an agreement express or implied conferring on him a power to sell against the owner's wishes. On appeal it was held by *Sir Arthur Collins*, C. J., and *Benson*, J., that under S. 202 of the Contract Act, the agent's authority to sell as he thought fit was irrevocable in the absence of an express contract reserving to the owner a power of imposing fresh terms on the factor. We do not think that S. 202 really throws any light on the matter. It merely prohibits a termination of the agency. It does not prohibit the principal from fixing a limit of price. So long as the goods are allowed to be in the hands of the factor and he is authorized to sell out above a certain limit, it would be difficult to say that the agency has been terminated. The question must, therefore, be decided upon general principles. The powers of an agent are no doubt open to modification by the principal. But where he has acquired an interest in the subject matter of the agency as in the present case, the transaction is virtually one of pledge and it would be unreasonable to allow the owner to hamper the agent in the realization of the amount due to him by unreasonable restrictions. The true principle appears to us to be that stated by

Farran, J., in *Jafferbhoy Ludhabhoy* v. *Charlesworth*, I. L. R., 17 B., 543, where goods are consigned to a foreign merchant as security for an advance, albeit he may be a factor entrusted with the sale of goods on commission and where by reason of the fall in the market or other causes his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to the principal, although the latter may place a limit on their sale and desire to hold on, if the principal do not put the factor in funds to make up the deficit. This conclusion tends to convenience and justice and is in line with the American decisions.

Nalla Karuppa Settiar *v.* **Mahomed Iburam Sahib,** I. L. R., 20 M., 112. The decision in this case appears to us to be right. Mere membership in a firm which carries on business within the jurisdiction of a Court is not enough to confer jurisdiction; nor is the fact that a person is interested in immoveable property situated within the jurisdiction of a Court sufficient where the suit does not relate to such property. The doctrine of constructive residence and submission to jurisdiction cannot be maintained after the decision of the Privy Council, *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, L. R., 21 A., 171, 186.

Kadar Hussain *v.* **Husain Saheb,** I. L. R., 20 M., 118. The Full Bench is clearly right in holding that Art. 12 of the Limitation Act does not apply to a suit for the recovery of land sold by mistake in execution of a decree where the plaintiff was not a party to or bound by the decree or the sale.

The article is applicable to the case of persons who would be bound by the sale if they did not impeach it.

Krishna Pattar *v.* **Srinivasa Pattar,** I. L. R., 20 M., 124. We find it difficult to understand this decision except upon the principle of a compensation of errors. In a decree for redemption of land, the mortgagor was, in accordance with the law in Malabar, directed to pay a sum of Rs. 1,429 to the mortgagee as compensation for improvements made by the latter. The mortgagor applied for execution within six months of the decree. But during this interval the value of the improvements had diminished without any fault on the part of the mortgagee by the cost of trees of the value of Rs. 157. Was the mortgagor bound to pay the sum decreed or that sum *minus* the amount of the loss. The Madras High Court rules that the mortgagor is only bound to pay a smaller sum. The learned Judges point out that the basis of the liability to pay compensation is the benefit arising to the mortgagor

from the improvements and that the liability cannot exceed the benefit. This principle is no doubt applicable, but we do not see how the rights of parties can be unsettled after they have been once determined by the decree. The mutual rights of the parties are ascertained by the decree and the parties cannot subsequently claim to go behind it. The fact that the relation of mortgagor and mortgagee subsists even after decree can be no ground for disturbing the decree. The decision is opposed to sound principles and its only justification is that the Madras High Court has held that when the value of the improvements rises since the date of a decree for redemption, the mortgagee can claim a re-valuation in execution proceeding, *Rammuni* v. *Sankar*, I. L. R., 10 M., 367.

Ishan Chundar Sirkar *v.* **Beni Madhub Sirkar,** I. L. R., 24 C. 62. Where a person purchases the equity of redemption in certain property in execution of a money decree against a mortgagor, and a mortgagee subsequently executes his decree against the properties purchased, the execution purchaser is according to the Full Bench entitled to come in as a representative of the judgment-debtor under S. 244 of the Code of Civil Procedure.

Sheo Shankar Gir *v.* **Ram Shewak Chowdhry,** I. L. R., 24 C. 77. The decision in this case as to the inapplicability of Art. 91 of the Limitation Act to a suit to set aside an alienation by the manager of an endowment is in keeping with other recent decisions in regard to suits for the purpose of setting aside the acts of persons similarly situated. In such cases the transaction entered into by the guardian or manager is either void or valid and is not voidable. If it is valid, it is binding; if it is void, no suit is necessary to set it aside.

SUMMARY OF RECENT CASES.

Suit for rescission of contract—Inconsistent claim—Motion inconsistent with suit.

Cook *v.* **Andrews** [1897, I, Ch. 266, per *North, J.*]

The plaintiff had agreed to sell to the defendant certain leasehold premises under the following conditions:—(1) The defendant was to pay a certain sum of money at the time of delivering possession; (2) he was to pay on taking possession the rents and other outgoings and the cost of a new fence erected by the plaintiff. The prescribed sum was paid

on taking possession, but the defendant failed to pay the rents and the cost of the fence. The lease was about to be forfeited and the plaintiff had to pay the rents to preserve it. The plaintiff then commenced an action for rescission of the agreement on the ground that he had been induced to enter into it by misrepresentation, and in that suit moved for an order directing the defendant in pursuance of a term in the agreement to deliver up possession of the leasehold to the plaintiff in default of his paying to him or into court the sums that he had paid for rents.

Held: that the motion seeking in effect the specific performance of the agreement was inconsistent with the claim in the suit which was for its cancellation and must, therefore, be refused.

But that a receiver may be appointed to secure the payments in question and thus to prevent forfeiture.

Landlord and tenant—Forfeiture for breach of covenant—Notice of breach.

Fletcher v. Nokes [1897, I, Ch. 271, per *North, J.*]

The law has always been very anxious to give relief to tenants against forfeitures of their leases for breaches of covenants, though no doubt by so doing it has had to violate the fundamental rule that parties ought to be left to the results of their own contracts. The Indian legislature has done something in this line by enacting S. 114 of the Transfer of Property Act. But we venture to submit that the scope of the section is very limited and that more cases of relief against forfeitures should be provided for and more precautionary measures should be imposed on the landlord to be adopted by him before rushing into court. For instance, the inserting in the Transfer of Property Act of a provision like that of S. 14 (1) of the Conveyancing and Law of Property Act 1881 (44 and 45 Vict., c. 41) would be very advisible. Under that section before the landlord can take advantage of a forfeiture for breach of covenant he must first serve a notice on the tenant giving him particulars of the breach complained of, and if the breach is capable of remedy, requiring him to remedy the breach, and in any case to make compensation in money for the breach within a reasonable time to be fixed.

A landlord gave notice to his tenant to the effect "that you have broken the covenants for repairing the inside and outside of the houses leased to you, &c.," and sued for possession of the houses from the tenant. The rest of the notice satisfied the provisions of the section

above-mentioned. The Court held, however, that no particulars of the breaches complained of had been given and that the plaintiff must consequently be non-suited.

Power of appointment—Power in the nature of a trust.

In re **Weekes' Settlement** [1897, I, Ch. 289, per *Romer*].

The distinction between a mere power of appointment and a power in the nature of a trust has not always been correctly appreciated and applied by Judges to the facts of particular cases that come before them. The distinction is important, because in the latter case if the power is not exercised the courts will carry out the trust where as in the former the courts will not take any action if there is a default in the exercise of the power. There is a conflict between the decided cases on this point, and some cases have laid down that where there is a power of appointment given to an individual in favor of some persons and there is no gift over in case of failure to appoint and the holder of the power makes default in the appointment, then the power operates as a gift in favor of the intended appointees. This is rather stating the law too broadly. In fact, this is nothing but a mere rule of construction, and we have to look to the wording of the will or other instrument, as the case may be, to see whether there is a general intention to give to the intended appointees, though a choice might have been given to the holder of the power to select from among that class. There is no doubt, however, that the absence of a gift over is one consideration to be borne in mind in seeing whether there is really an intention to give to the class. The proper rule to be inferred from a perusal of the cases seems, therefore, to be as follows. Where it appears by the application of the ordinary rules of construction that a general intention is found in a will or other instrument to give to a class and a particular intention in favor of some of these, unascertained at the time, but to be ascertained by the selection by a particular person, as for example, a gift to A for life with a gift over to such of a class as A, shall appoint; then even though the particular intention may fail by reason of the power not being exercised still the general intention in favor of the class will be given effect to by the courts. In other words the trust must be found in the instrument and is not to be brought into existence by any technical rule of law.

A testatrix bequeathed to her husband a life-interest in certain real property, and gave "him power to dispose of all such property in

favor of our children." The will contained no gift over in default of appointment. There were children, but the husband died without exercising the power.

Held: that the husband had a mere power to exercise, that it was not one coupled with a trust, and that there was no gift to the children by implication and that the heir at law of the testatrix was entitled to the estate.

Company winding up—Effect of transfer of shares with the sanction of liquidator.

In re **National Bank of Wales.** Taylor, Phillips and Rickards Cases [1897, I, Ch. 298, C. A.]

Section 131 of the Companies Act, 1862, enacts that "all transfer of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencenent of such winding up shall be void." This corresponds with S. 197 of the Indian Companies Act, VI of 1882. With reference to this section it was held by the Court of Appeal reversing the decision of *Vaughan Williams*, J. (1) that the power given to the liquidator in this section to sanction transfer of shares involved the power to alter the register of members; (2) that the final transferee alone was liable to be put in the list to contribute as a present member; and (3) that the transferor and all prior transferees were liable as past members.

The word 'share' in the section denotes not only rights but obligations also. When a member transfers his share he transfers all his rights and obligations as a shareholder in the Company as from the date of the transfer; he transfers his rights to future payments and his liabilities to future calls. The power given to the liquidator includes therefore not a power to sanction a transfer of benefits only but of the whole bundle of rights and obligations. Again, the words "or alteration in the status of the members of the Company" refer to some alterations other than transfers sanctioned by the liquidator, *i.e.*, transfers made before commencement of the winding-up and without the sanction of the liquidators, but not then registered.

Search warrant—Sufficiency of information.

Jones *v.* **German** [1897, I, Q. B. 374, C. A.]

In this case the plaintiff sued the defendant, a magistrate, for trespass to goods and wrongful imprisonment by the issual of a search warrant on

insufficient information. The information was to the effect that the complainant had reason to suspect and did suspect that his servant had in his possession some articles of his which he had packed in his boxes, that the servant was about to depart from the place under a notice to quit, and that he would not let his boxes be searched. The defendant thereon issued a search warrant, and some articles in the servant's possession were identified as the complainant's and the plaintiff was prosecuted. The prosecution was, however, afterwards withdrawn. The plaintiff now sued the magistrate for damages. The Court of Appeal confirming the decision of *Lord Russel of Killowen*, (*vide* 7 M. L. J., p. 48) held (1) that in an information for a search warrant it is not necessary to have an allegation that an offence had in fact been committed; (2) that it was not necessary to specify in the information the particular goods for which a search is desired; and (3) that the information in question was a proper one.

Criminal responsibility for acts of servants.

Collman *v.* **Mills** [1897, I, Q. B. 396, per *Wills*, J.]

The doctrine that the master is liable for all wrongful acts committed by his servant in the course of his employment has been extended in this case so as to make the master liable, not only civilly, but also criminally. We are afraid that this is rather an undue extension, especially when regard is had to the statute under which this conviction was sustained. The section of the statute runs as follows:—" An occupier of a slaughter-house shall not slaughter, or permit to be slaughtered, any animal within public view or within the view of any other animal." During the absence of his master, the licensed occupier of a slaughter-house, a servant of his in direct disobedience of the order of his master, and in order to save himself trouble, slaughtered a sheep in the yard in the presence of other sheep. The master was prosecuted for this act of the servant under the above section and convicted. Certainly by no ingenuity whatever can it be said that the master slaughtered the animal so as to make him criminally liable for slaughtering, and it is rather strange to say that a man permits the doing of a thing, the doing of which he has expressly prohibited.

Landlord and tenant, liability of—Dangerous condition of premises let.

Lane *v.* **Cox** [1897, I, Q. B., 415, C. A.]

The defendant let an unfurnished house of which he was the owner to a weekly tenant. There were no covenants to repair on the part of the landlord. The plaintiff came upon the premises at the request of the tenant to remove for the purpose of moving some furniture. While so employed he was injured owing to the defective state of the staircase in the house. The staircase was in this defective state at the time when the house was let. The plaintiff now sued the owner (the defendant) for damages.

Held: (Confirming the decision of the Lord Chief Justice) that the defendant was not liable.

In order that a person may be liable to another for negligence there must be a duty owed by him to the other, either under a contract or otherwise, and that duty must be neglected. Clearly there was no duty in this case between the plaintiff and the defendant under any contract, and there is no duty under the general law upon a landlord not to let an unfurnished house in a dilapidated condition to a tenant.

Contracts of Public servants—Implied warranty.

Dunn *v.* **Macdonald** [1897, I, Q. B., 401, per *Charles, J.*].

The defendant, a public servant of the Crown, was the Consul-General of the Niger Protectorate. While so employed he had engaged the services of the plaintiff on behalf of the Crown for a period of three years certain. The plaintiff was, however, dismissed within the term. He first sued the Crown for damages and was non-suited on the ground that the Crown had engaged him at its pleasure (*vide* 6 M. L. J., 65—1896, I, Q. B., 116, C. A.). He now sued the defendant on the ground that the defendant was liable for a breach of an implied warranty that he had authority to engage the plaintiff as a servant of the Crown for three years certain, in accordance with the doctrine laid down in *Collen* v. *Wright* (8 E. L. B., 64—7).

Held; by *Charles, J.*, that the doctrine that an agent who makes a contract on behalf of his principal is liable, on breach of it, to the other contracting party for a breach of an implied warranty of his authority to enter into the contract, is upon grounds of public policy, not applicable to persons in public employment of the Crown.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Harvard Law Review for April (*in exchange*).

The Albany Law Journal for April (*in exchange*).

The University Law Review for April (*in exchange*).

The Educational Review for April (*in exchange*).

The Calcutta Weekly Notes for April (*in exchange*).

State Library Bulletin for March 1897.

A Counsel defending:—"We propose to show, gentlemen of the jury," said counsel for the defence, in Judge Chetlain's court the other day, "that it is impossible for the defendant to have committed this crime.

"In the first place, we will prove that the defendant was nowhere near the scene of the crime at the time the crime was committed.

"Next we will offer the indisputable testimony of persons who saw the defendant on the spot and who did not see the defendant commit the crime.

"We will show that no poison was found in the body of the deceased.

"Not only that, but we will prove that it was put there by the prosecution in this case.

"We will, furthermore, show that the deceased committed suicide.

"And last, but not least, we will prove beyond the shadow of a doubt that the deceased is not dead.

"In view of which corroborative facts, gentlemen of the jury, we respectfully ask for an acquittal."—*The Albany Law Journal.*

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"*Not Considering Them.*—"I judge, then," said the lawyer, "that your conjugal relations are not happy."

"Well," answered the client, "some of my conjugal relations don't care two straws how me and my wife gets along, and others of them, particularly my wife's mother, just delights to see us quarrel. But I don't see as it's their business; and, you bet, if I make up my mind to

separate from my wife, I ain't goin' to ask whether my conjugal relations is happy or not!"—*The Albany Law Journal.*

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A witness's nationality.—Magistrate—What is your nationality?

Witness—Well, sir, my father was Irish, my mother was an American, and I was born in a Dutch brig sailing under French colors in Spanish waters.

Magistrate—That'll do, my man; you can stand down.—*The Albany Law Journal.*

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A witty answer.—Judge B—— fell down a flight of stairs, recording his passage in a bump on every stair, until he reached the bottom.

A bailiff ran to his assistance, and, raising him up, said:

"I hope your honor is not hurt?"

"No," said the judge, sternly, "my honor is not hurt, but my head is."—*The Albany Law Journal.*

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Co-respondent in Divorce Cases:—In *Saunders* v. *Saunders*, the Court of Appeal had to decide a question of great importance in divorce procedure—*viz.*, whether, when a petitioner can obtain no evidence against a man with whom his wife owns to having committed adultery, the Court can give him leave to proceed without a co-respondent. The cases are hopelessly contradictory, but last year Mr. Justice Barnes, with the concurrence of Sir Francis Jeune, laid down the rule that when adultery is alleged to have been committed with a man whose name and identity are known, and who is alive, the petitioner must make him a co-respondent, although he finds that evidence cannot be obtained which will prove the case against such co-respondent (*Jones* v. *Jones*, 65 Law J. Rep. P. 101; L. R. (1896) P. 165). In the present case Mr. Justice Barnes naturally followed his previous decision, which has now been reversed by a majority of the Court of Appeal. It is certainly a hardship to compel a petitioner to make a person a co-respondent against whom he has no evidence, so that he will run the risk of having to pay the co-respondent's costs. Therefore, on the whole, the judgment of the Court of Appeal seems the proper one when there is no reason to doubt the *bona fides* of the petitioner, and that all possible endeavours have been made to obtain evidence. Yet there are weighty reasons in favour

of the practice adopted by the present judges of the Probate Divison. It lessens the risk of collusion, and in one sense it is a benefit to the co-respondent, for it enables him to appear and, if he wishes it, deny on oath a charge which, though it is not formally made against him, must be mentioned in proving the wife's confession. As Lord Justice Smith agreed with the decision of Mr. Justice Barnes, in which he knew that the President of the Division concurred, we think it a matter of regret that the point has not been re-argued before the full Court of Appeal.—*The Law Journal.*

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A new trial owing to inefficiency of counsel:—In a recent case in the Cook County (Ill.) Criminal Court the defendant, who had been found guilty by a jury, was granted a new trial by the judge, on account of the inefficiency of the counsel who had defended him. This seems to be establishing a new principle, for the almost uniform tenor of the decisions is to the effect that neither ignorance, blunders nor misapprehension of counsel, not occasioned by his opponent, is reason sufficient for setting aside a judgment and granting a new trial. Any other course would, perhaps, be apt to lead to collusions and confusion in the administration of justice, and for this reason courts are strongly disposed to hold parties as bound by the acts of their attorneys in their behalf, in all cases where they are authorized to appear, and in which no fraud is shown, the client being left to his remedy against the attorney for negligence. There are a few reported cases in which the contrary has been held, the leading one being that of *State* v. *Jones* (12 Mo. App. 93), where the record presented such a lamentable example of ignorance and incompetency that the Court of Review held that the trial court should have afforded the remedy by setting aside the verdict and appointing a competent attorney to defend the prisoner. The Chicago Law Journal, in discussing the Cook county case, while conceding that the action of the judge may have done violence to technicality, nevertheless believes it tended to compass the ends of justice—and for such purposes are courts established and maintained.—*The Albany Law Journal.*

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The Law is no respector of persons.—That there are still some queer laws on the statute books of England was shown the other day, when an ex-chancellor of the exchequer was convicted at Bow street and fined because the chimney of a house he is at present occupying caught fire. The conviction was under section 23 of 28 and 29 Vict. c. 90, which provides that if the chimney of any house within the metropolis is on

fire the occupier of such house is liable to a fine of twenty shillings. No defense whatever seems to be available to the occupier if the fact of the fire be established. In this case the right honorable defendant had been only a very short time in occupation of the house, and it was shown that he had employed sweeps on this very chimney just before the fire, but he was mulcted, nevertheless. Although no defense is available to the occupier, it is provided that if he can prove that the fire was caused by the neglect or wilful default of some other person, he can recover the penalty he has had to pay summarily from such other person. In the case under consideration, however, there seems to be no such loophole of escape for the distinguished defendant. When an ex-cabinet minister is thus summoned to a police court, and fined, it may be conceded that in old England the law is no respecter of persons.—*The Albany Law Journal.*

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Torts—Joinder of Actions—Animals:—The Supreme Court of New Jersey decides, in *State* v. *Wood* (35 Atl. Rep. 654), that a joint action will not lie against the separate owners of dogs which unite in destroying the property of a third person. Each person is liable only for the damage done by his own dog, and not for that which is done by the dogs which do not belong to him. This rule applies to all cases of trespass by animals.—*The Albany Law Journal.*

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A Legal Laugh:—It has not been so very long since the old English court rules passed out of observance, and when they were in vogue nowhere were they observed more strictly than in South Carolina. A rule provided that a lawyer, when he spoke in court, must wear a black gown and coat, and that the sheriff must wear a cocked hat and sword. On one occasion a lawyer named Pettigrue arose to speak in a case on trial.

"Mr. Pettigrue," said the judge, "you have on a light coat. You cannot speak, sir."

"Oh, your honor," Pettigrue replied, "may it please the court, I conform to the law."

"No, Mr. Pettigrue," declared the judge, "you have on a light coat. You cannot speak, sir."

"But, your honor," insisted the lawyer, "you misinterpret. Allow me to illustrate. The law says that the barrister must wear a black gown and coat, does it not?"

"Yes," replied the judge.

"And does your honor hold that it means that both gown and coat must be black?"

"Certainly, Mr. Pettigrue; certainly, sir," answered his honor.

"And the law further says," continued Mr. Pettigrue, that the sheriff must wear a cocked hat and sword, does it not?"

"Yes, yes, Mr. Pettigrue," the court answered, somewhat impatiently.

"And do you mean to say, your honor," questioned Pettigrue, "that the sword must be cocked as well as the hat?"

"Eh? — er — h'm," mused his honor. "You — er — continue your speech, Mr. Pettigrue."—*The Albany Law Journal.*

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Going too far.—It was in an Irish court that a man was called into the witness-box not long ago, and being old and just a little blind, he went too far, in more than one sense, and, instead of going up the stairs that led to the box, mounted those that led to the bench. Said the judge, good-humoredly: "Is it a judge you want to be, my good man?" "Ah, sure, your honor," was the reply. "I'm an old man now, and mebbe it's all I'm fit for."—*The Albany Law Journal.*

An Unique Law School:—The Law School of the University of Buffalo is unique in one respect: the lecturers, with one exception, are active practitioners, and with four exceptions serve without compensation. The board comprises many of the ablest and busiest men in the city, and they make it a point to prefer their lecture engagement to professional business except when they are actually engaged in trials. The result is thus described in a recent circular issued by the Board of Control.

"In the course of the arguments at Albany it was discovered through the report of Mr. Franklin M. Dancher, Secretary of the State Board of Law Examiners, that of the seven law schools in the State, the Buffalo Law School stands at the head in point of standard; that in percentage of successful examinations taken for admission to the Bar, our school is first, and a larger proportion of our graduates are successful than of any school. This fact itself was a powerful argument against any proposed change in our system of instruction, and it indisputably established the truth that instruction is best secured from lawyers in the active practice of their profession.—*The Green Bag.*

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Lawyer's Fees:—Systems of remuneration are as various as the devision of legal functions. Our own system of fixing a scale of charges for each service is one which it is difficult to justify on any rational ground. It places a premium upon lengthy proceedings and is as unsatisfactory to the solicitor as to the client. A similar system, says Master MacDonnell, exists in Scotland, France, Holland, and Italy; but nowhere, except in colonies which have adopted procedure similar to ours, is an attempt made to separate the items of service with the minuteness to be found in an English bill of costs. In the United States there are, it appears, no scales of costs, and remuneration in contentious matters—according to Mr. Newton Crane, an English barrister and also a member of the Bar of the Supreme Court of the United States, who has contributed valuable information, nearly all the work for which an American lawyer is paid is contentious—is regulated entirely by special agreement, by *quantum meruit.* It follows that there is no such thing as taxation. If the client refuses to pay, the lawyer must have his compensation settled in an action. As to the form of the bill, a separate item may be charged for each service, or a lump sum may be stated for professional services and disbursements. Every imaginable intermediate course, we are told, between these two extremes is also adopted. In America it is common with lawyers of good standing to stipulate that payment shall be contingent on results, though in European countries this, even where it is allowed, is considered bad form. Germany has, by an ordinance of 1879, amended in 1890, struck out a

line of her own in respect of costs. Fees proportionate to the value of the subject matter in dispute are allowed at certain definite stages in the cause—fee for action, fee for hearing, fee for evidence, and additional fee for hearing if there is a further hearing after the taking of evidence; and these cover all intermediate steps. From the examples given the fees appear to be very low. If a case is settled the lawyer receives the same fee as for the hearing. A singular feature in the German system is that court fees and expenses of witnesses and experts are paid in the first instance out of public funds, and are repayable by the party who is ordered to pay the costs. If he is insolvent, it is the public funds that suffer, not the successful suitor. In Denmark this generosity is carried to a step further, and the lawyer assigned to a person allowed to sue in *forma pauperis* is paid out of the public funds.—*The Solicitor's Journal.*

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The Madras Law Journal.

PARTS V & VI.] MAY & JUNE 1897. [VOL. VII.

RENT RECOVERY ACT AMENDMENT BILL.

This Bill introduced by the Honourable the Acting Advocate-General into the local Legislative Council has met with opposition altogether unlooked for. The Bill appeared to us to be so little of a controversial character, that we expected it to be passed at one sitting of the Legislative Council without much discussion; and yet it has awakened an amount of interest in the "Madras Mail," and a keen opposition in the Hon. Mr. Crole which have necessitated a somewhat lengthy notice of the measure in these pages.

There is no tenancy law in this Presidency, nor has there been at any time since the commencement of the Regulations which marked the beginning of orderly government under British rule. There is no enactment specifying the character of the various tenures or the quantum of interest possessed by the holder of each tenure in the soil and defining the relations of the various tenure-holders *inter se* and to the Government. We have only a Rent Recovery Act defining the processes available to the landlord for the recovery of rent and the pre-requisites for the issuing of such processes. If an amendment were called for in such a law, either because the pre-requisites imposed certain hardships or resulted in certain loss to the landlord or the tenant, or because the processes were not sufficiently effective for the realization of rent, it stands to reason that such an amendment would have nothing to do with the definition of proprietary or tenancy right which would fall within the natural province of tenancy legislation. No doubt, if tenancy legislation were undertaken in a thorough-going spirit, the provisions with regard to the recovery of rent would form a fitting chapter of such a legislation. But it seems out of keeping with the framework of the Rent Recovery Act, as we have it, to introduce

into it provisions defining occupancy rights, or the mode of their acquisition; and yet the gravamen of the charge against the Bill appears to be that it has not attempted this incongruous task, and has thereby shown little tenderness for the interests of tenants sought to be protected by the opponents of the measure. It is absurdly enough suggested that the decision of the High Court in *Chokkalinga Pillai* v. *Vythilinga Pandara Sannadhi*, 6 M. H. C. R., 164, dealt a death blow to the rights of zemindari tenants which it is alleged to have been the policy of the Legislature to foster. Starting with this erroneous assumption the Hon. Mr. Crole has assailed the Bill with considerable vigour of language as perpetuating the erroneous and mischievous tendency alleged to be the result of that decision. But the decision in that case is one of the best considered and thoughtful decisions of the High Court of Madras, and though it has sometimes been misunderstood as pointed out by *Sir Charles Turner* in *Karpakambal Ammal* v. *Ganapathi Subbayyan*, I. L. R., 5 M., 234, it has always appeared to us to be a sound exposition of the law. The decision in *Chokkalinga Pillai's* case merely points out that the regulations do not confer any right of occupancy, and that such rights, whether based upon grant or custom or immemorial usage, continue unaffected by the regulation and have to be established or negatived according to the circumstances of each case. Indeed it has been pointed out in *Venkata Mahalakshmamma* v. *Ramajogi*, I. L. R., 16 M., 271, that the Zemindar suing to eject a tenant from the holding must show that the tenant came into occupation under him. It has also been held in two other cases (*Appa Rau* v. *Subbanna*, I. L. R., 13 M., 60, and *Venkatacharlu* v. *Kandappa*, *Ib.* 15 M., 95), that the Zemindar seeking to establish that he has the right to eject a ryot bears the burden of proving that he has the right. It seems, therefore, altogether unwarranted to assume that the decision in *Chokkalinga Pillai's* case has been departed from in letter or in spirit in subsequent cases, or that the decision is adverse to the rights, whatever they may be, of zemindari tenants. If under these circumstances, one should demur to the propriety of introducing any provision about occupancy rights in an Act whose scope is altogether different, he cannot run the risk of rendering himself obnoxious to the charge of sacrificing the interests of tenants. It is, moreover, no easy matter to define the modes of acquisition of occupancy

rights as regards various kinds of landed property and in the different parts of the Presidency. This Bill does not militate against the possibility of legislation as regards land tenures, and when such legislation is introduced, the provisions of this Bill will be found to be entirely in harmony with it.

Another charge equally serious against this Bill is that it prejudices the position of the tenant as the exchange of *puttah* and *muchilika* ceases to be a condition precedent to a suit for rent. The law on the subject already existing has been considerably misunderstood... A suit for rent is only cognizable by the Civil Courts, and Ss. 12 and 87 clothe the Civil Courts with full power to consider the propriety of the rates of rent in conformity with the provisions of the Rent Recovery Act. But a landlord is precluded from introducing a suit for rent, or from taking any proceedings under the Act, unless puttah and muchilika have been exchanged, or puttah has been tendered, or such exchange has been dispensed with. *Holloway, J.*, protested in the Full Bench case reported in *Gopalasawmy Mudelly* v. *Mukkee Gopalier*, 7 M. H. C. R., 312, against the construction of the Act which rendered the exchange or tender or the agreement to dispense with such exchange a condition precedent to a suit for the recovery of rent instituted in Civil Courts. But the majority overruled him, and the result of that decision has landed us in a state of things which is positively disgraceful to the administration of justice. The tender of puttah should be within the fasli itself, and the puttah tendered should be a proper one. If a puttah defective in any of the numerous stipulations ordinarily contained in it were tendered within the fasli and the error being rectified, an amended puttah was tendered after the expiry of the fasli, such a tender is no good. Again, if a landlord sues for rent undoubtedly due and in arrear, having tendered a puttah defective in any respect, the whole suit has to be dismissed; and, although the courts may differ as regards this supposed error or defect in the puttah, the decision of the Court of last resort invoked by the tenant may end in the dismissal of the whole action. The landlord may go to the Revenue Court to compel the tenant to accept a puttah, and the question in dispute between them, however trivial, may become the subject of adjudication by three Courts in succession, the litigation lasting several years, the

landlord paying the peishcush due to Government out of his pocket, and the puttahs tendered by him during those faslies in accordance with his own original puttah or in the amended form as settled by the Court of first instance or Court of Appeal becoming useless in consequence of the decision of the court of last resort imposing a further term or making a new modification. This state of things which has been the source of great loss to many a landlord in the country has been crying aloud for legislative interference for many years, and when the first helping hand is stretched out to them, the cry is raised that this is class legislation bolstering up the rich and bringing ruin to the poor. We have been astonished at the callousness of our legislators and in no other country would this have been possible. The Revenue Courts have no jurisdiction to decide suits for rent and nothing is taken away from them by the Bill to be given to the civil courts. If under the law as it stands at present, the landlord and the tenant agreed to dispense with *puttahs* and *muchilikas*, they would be in the same position as regards the institution of suits of rent as this Bill would place them in without such agreement. In both cases the Civil Courts possessing the jurisdiction could determine the correctness of the amount claimed in accordance with the rules contained in the Act. If the exchange of puttah and muchilika be such a valuable aid to the tenant and a check against the rapacity of the landlord as it is alleged to be, there is no danger of its falling into desuetude, as the summary remedy provided by the Act, such as distraint or sale of defaulter's interest could only be had recourse to if the pre-requisites to be had under the Act be complied with; and the landlord is not likely to overlook the advantage of such remedies, as these are more expeditious than going to the Civil Courts for a decree for rent which has to be executed again against the property of the defaulter, while the peishcush payable out of the rents of the properties has to be paid by him to Government within the fasli. The tenant again if he is particular about the tender of a puttah is not without his remedy, for he can institute a suit under the Act after a demand as soon as the fasli commences to compel the landlord to deliver a puttah.

We have hitherto assumed that the exchange of puttah and muchilika is a very valuable privilege of the tenant; but we fail

to see how it is. No such exchange is necessary under the Bengal Tenancy Act, a piece of legislation which was considered for several years in the Supreme Legislative Council and evoked the keenest criticism on the part of wealthy Zemindars in that province; and even where such exchange is necessary under the earlier Tenancy Legislation of Bengal, Act XI of 1859, it was no condition precedent to a suit for rent in the Civil Courts. It certainly appears to us that we may well follow the leading of Bengal in this matter. A great deal too much of importance has been attached to the exchange of puttah and muchilika. The only explanation of this frame of mind appears to be that too long familiarity with this state of things in this province has disabled some people to judge dispassionately whether the system under which we have lived is necessary for the well-being of the people. There is no transfer of any jurisdiction from the Revenue Courts to the Civil Courts under this Bill, and even if there were, the advantage will certainly be in favour of the stationary Civil Courts as against the peripatetic revenue tribunals as it has been found by experience in Bengal; for, each successive legislative attempt there has been in favour of restricting the jurisdiction of the Revenue Courts and of expanding that of the Civil Courts until at last Civil Courts have acquired exclusive jurisdiction.

It has been said that the introduction of this Bill is an experiment in piece-meal legislation. Such critics seem to be altogether unaware of the mode in which legislation comes into existence in England. A hundred enactments could be instanced to show that where a particular evil was found to require a remedy, it was at once supplied without waiting to see whether a searching enquiry would bring to view other evils on which people might be more or less agreed. A great English case *Derry* v. *Peek* was decided by the House of Lords, and they ruled that no action lay on the part of a shareholder for damages, because the promoters through carelessness had made certain representations which were untrue, but which they believed to be true as to their powers under the statute incorporating them. A Bill was at once introduced to render such careless representation actionable and the Bill was passed into law within a few months after the decision. Was it objected to this legislation that it only related to the reckless representations of promoters of companies and that it did not relate to other careless

representations by other persons or bodies? No; and the simple reason is that those that favoured the new law and those that opposed it knew perfectly well that if legislation was always to be in comprehensive Codes and not to remedy particular abuses, society might groan under many evils for many a day.

There is another important provision in the Bill repealing that most objectionable provision in S. 10 of the Act rendering the tenant liable to eviction if he does not comply within ten days of the judgment of the Revenue Court requiring him to accept the puttah. There is no justification for this extraordinary penalty and the landlord is not similarly punished for default in tendering the puttah. We move so slowly in this country that such a provision has remained in the Statute Book for more than thirty years without inviting any comment or criticism from those that have been charged with the enforcement of this law.

The opposition of the Hon. Mr. Crole has delayed the passing of this Bill for another session; and the periodical movement of the Government to the Hills has interposed another period of six months before the Bill can be taken into consideration. The masterly speech of the Honourable the Acting Advocate-General has exposed every specious argument advanced against the measure. Notwithstanding the threatening attitude assumed by Mr. Crole, we hope, he will more dispassionately consider the measure in the light of the arguments and explanation afforded in its favour by the mover, and lend the measure the weight of his valuable support. In the meantime many a landlord will have lost another year's rents with the help of those technical devices which the law, as it stands, has placed within the hands of tenants.

A HINDU GUARDIAN'S OBLIGATION TO MARRY HIS FEMALE WARD.

I propose to examine in this article the nature and the extent of the obligation of a Hindu father or guardian to get his daughter or ward married. For satisfactorily deciding the question it becomes necessary at the very outset to enquire whether marriage is necessary for, or optional with, women of all the four classes.

As for women of the Sudra class it is easy to see that in their case marriage is entirely optional. The texts of the *Smritis* which lay down that marriage is a *samskāra* (purifying ceremony) necessary to be performed to effect the complete regeneration of the three twice-born classes do not apparently apply to *Sudra* women. Manu says: "With holy rites, prescribed by the Vedas, must the ceremony on conception and other sacraments be performed for *twice-born men* which sanctify the body and purify (from sin) in this life and after death." (Manu, chap. II, 26.) After naming and defining the various sacrifices enjoined by the Vedas, Manu closes the portion of the chapter relating to sacraments thus: "Thus has been described the rule for the initiation of the *twice-born*." (Manu, chap. II, 68.) Another argument for holding that marriage is entirely optional with Sudra women is afforded by the text of Brihaspati which says that women not married within the time allowed by the shasters become *Vrishalis* (Sudra women)—a consequence which need not alarm a Sudra woman.

As for women of the three regenerate classes, the question whether marriage is in their case obligatory or optional does not appear to be free from difficulty. A large number of texts from various *Smriti* writers appears to lay down that marriage is an indispensable sacrament. Manu says: "Reprehensible is the father who gives not his daughter in marriage at the proper time." (Manu, chap IX, 4.) Narada says: "Let no maiden suffer the period of maturity to come on without giving notice of it to her relations. Should they omit to give her in marriage, they would be equal to the murderers of an embryo. Therefore, a father must give his daughter in marriage as soon as the signs of maturity become apparent. Otherwise he would commit a heinous crime. Such is the rule settled among the virtuous." (Narada, chap. XII, 25 and 27.) Brihaspati says: "A father who does not give his daughter in marriage in proper time deserves contempt and shall be punished as ordained by law." (Brihaspati, chap. XXIV, 3.) But all text-writers are also agreed, on the incapacity of women to recite Vedic mantrams and join in placing the marriage of women on the same footing with that of Sudras. It appears rather to follow that marriage is the only one of the many sacraments *permitted to*, and not *enjoined upon*, women and Sudras. Mr. Bhattacharji also

says that marriage is the only sacrament permitted to women and Sudras, although he relies on no authority in support of his position. Anyhow the mentioning of Sudras and of women in the same breath in respect of marriage is a clear indication that marriage cannot be more necessary in the case of the latter than in that of the former. It has never been seriously contended that Sudras are under an obligation to marry and it appears to follow as a matter of logical reasoning that women too are under no obligation to marry.

A second argument in favour of the theory that marriage is optional with women is afforded by the texts of Manu, Brihaspati and Narada. These *Smriti* writers recognize distinctly the existence of a class of female ascetics. Manu says: "He who secretly converses with such women or with female slaves kept by one and with *female ascetics* shall be compelled to pay a small fine." (Manu, chap. VIII, 363.) Narada says: "Daughter, spiritual teacher's wife, *sagotra* relation, one come to him for protection, a queen, a *female ascetic*, a nurse, an honest woman, and a female of the highest class; when a man carnally knows any one out of these women, he is said to commit incest." (Narada, chap. XII, 74 and 75.) Vishnu also speaks of the crime of having illicit intercourse with *female ascetics*. (Vishnu, chap. XXXVI, 7.) The absence of any indication of contempt in these texts referring to *female ascetics* shows that *female ascetics* as a class were recognized and respected—a circumstance not consistent with the theory which makes marriage obligatory on women. It must be remembered that the *Smritis* do not any where prescribe the life of an ascetic for widows, and it, therefore, follows that female ascetics here referred to are women who had not married.

Another argument in favour of this view is furnished by the long array of disqualifying circumstances, enumerated in every *Smriti* writer of note as rendering a woman absolutely ineligible for marriage. The course of decisions of the various High Courts has, indeed, led us to regard most of these prohibitory injunctions as mere recommendatory observations, or at the best, precautionary suggestions the disregard of which would not invalidate a marriage once performed. But none the less the strong language in which these prohibitions are conveyed, the apparently sound reasons on

which many of them are sought to be supported, and the dreadful consequences, both temporal and spiritual, which the disregard of these prohibitory injunctions are asserted to entail, make it abundantly clear that in the view of the authors of the various *Smritis* these injunctions were intended to be more than directory. How then could the *Smriti* writers have made marriage compulsory in the case of women consistently with imperatively commanding men not to marry women subject to disqualifications from all of which the majority of womankind are not free? The prohibition to marry girls or women subject to any of the numerous disqualifications enumerated in the *Smritis* would be reasonable only if marriage were regarded as optional for women.

Another argument is afforded by the texts of Manu and Narada. "Three years let a damsel wait though she had attained puberty, but after that time let her choose for herself a bridegroom of equal caste and lineage. If, not being given in marriage, she herself seeks a husband, she incurs no guilt, nor does he whom she weds." (Manu, chap. IX, 90 and 91). "If no such person (competent to give) be in existence, let the maiden have recourse to the king and let her with his permission betake herself to a bridegroom of her own choice." (Narada, XII, 22). If marriage before puberty were compulsory for women, it is impossible to see how a woman unmarried even after puberty incurs no guilt. Th text of Brihaspati quoted in the previous portion of this article unequivocally lays down that a woman unmarried even after puberty becomes immediately a Sudra woman and the man who marries becomes a Sudra also. Again, why should the woman or girl wait three years after puberty? If marriage before puberty was commanded in the case of women, why should she not be permitted to choose a husband for herself immediately after she attained puberty? Why should she report herself to the king and obtain his permission to marry? Why again did the *Smriti* writers who took care to lay down that the girl should wait three years after attaining puberty say nothing as to the time *within which* the girl *should* seek a husband for herself? What was the girl to do if the king for reasons of his own did not permit her to choose a husband for herself? According to the *Smriti* writers the probable age at which a girl attains puberty is twelve and she is commanded to wait three years after

that period before seeking a husband for herself. In the light of the texts above quoted, it appears that marriage is optional for women, that the father, brothers, &c., have the power to give his daughter or sister in marriage till she reaches the sixteenth year, and that she might choose a husband for herself after that period. The daughter is by *Smriti* writers regarded as the *property* of her father, disposable in marriage so long as she continues to be a minor, but having a will of her own and liberty to act in accordance therewith when she reaches the sixteenth year, the age of majority according to *Smriti* writers. Except on such a view it is not easy to explain why a girl should be given no power to give herself away in marriage till she passes her fifteenth year and why there is no limitation in respect of time for her choosing a husband for herself after that period. As the texts read, a girl cannot give herself in marriage until she passes the fifteenth year, although her guardians had neglected to get her married before puberty; but after the completion of the fifteenth year, she could seek a husband for herself with the king's permission and (I add) if she found one she may marry him at any time after her sixteenth year.

An implied permission to abstain from marriage is also apparently given by the highly eulogistic terms in which the authors of *Smritis* speak of a life of celibacy. The texts, no doubt, refer to males, but the reasons given for preferring a celibate life apply with equal force to women also.

A positive permission to marry or abstain from marriage is also given by Harita who distributes women into two classes—*Brahmavadhinyah* and *Sadhyovadhvah* (those who lead a life of celibacy and those who lead a married life). This division of women into two classes is a clear proof that marriage is optional for women. Yama says that this classification of women has reference to the state of things in former Yugas, and that the text of Harita is not applicable to the Kali Yuga. Yama does not rely upon any authority and offers no reasons in support of his limitation. He apparently bases it upon the fact that in the Kali Yuga the text of Harita on this point is not honoured by observance.

One strong argument usually advanced against treating marriage as optional for women of the regenerate classes especially is

the fact that Hindu fathers from time immemorial have invariably got their daughters married. It is contended that, although a few texts of some ancient writer may be unearthed and proved to make marriage a matter of option for women, the long-established custom of the Hindu women being invariably to marry overrides the written law and renders the authority of those texts utterly useless. The objection at the first glance appears to have considerable force which, however, upon a little close examination vanishes. This objection requires one to concede that because no Hindu woman had ever chosen or was permitted by her guardians during nonage to remain unmarried, it is illegal for a Hindu woman to abstain from marrying. A similar proposition of law was contended for in *Upoma Kuchain* v. *Bholaram Dhubi* (I. L. R., 15 C., 708), but their Lordships of the Calcutta High Court held that the non-existence of a practice is no ground for regarding it as illegal. The rule of law laid down in that case clearly applies to the case before us. It was there held that intermarriages between subdivisions of the same caste were not invalid on the ground that such intermarriages had till then not been in vogue. If, therefore, it be conceded or established by argument that marriage under the law as contained in the *Smritis* is not compulsory for women, the mere fact that Hindu fathers and guardians had invariably from time immemorial been getting their daughters and wards married is no ground for holding that no Hindu woman should choose to remain unmarried. I have thus endeavoured to show that according to the law of the *Smritis,* marriage is not so much *enjoined* on, as it is *permitted* to, women, that it is optional with them to marry or to remain unmarried for life, that the practice or custom of Hindu women being invariably married cannot affect their right to exercise the option of remaining unmarried for life, and that so far as Sudra women are concerned, marriage is clearly optional. As however, I am not perfectly sure of this ground, I shall concede for purposes of argument that a Hindu father is under an obligation to get his daughter married and proceed to examine whether it is a moral or a legal one.

It is a hopeless task to pursue the ancient writers in their fine and verbose disquisitions on the characteristic differences between the various classes of injunctions and to come to a satisfactory

conclusion as to the tests by which a particular injunction contained in the *Smritis* was intended to be merely recommendatory, morally binding or legally obligatory. This difficulty is considerably aggravated by the fact that in the Sanskrit language in which these *Smritis* are written the same form of verb is indifferently used to express an inviolable command, a mere wish, or even permission. But a close and intelligent examination of the manifold injunctions in the various *Smritis* affords one test which can be applied with the smallest chance of error. Three sets of injunctions are invariably found in all the *Smritis*. Obedience to one set of these is alleged to secure immense spiritual reward, nothing being said of the consequences of their violation. The violation of another set of these is alleged to lead to spiritual degradation, nothing being said of the consequences of obedience to them. Of the third set, the violation leads to undesirable consequences of a temporal nature and subjects the offender to amercement, no good, either temporal or spiritual, being predicted in case of obedience. The first set of injunctions is merely recommendatory and can be disobeyed without the fear of incurring even any moral blame. The second set is also recommendatory in the sense that they are not legally obligatory, though morally binding. The third set alone gives rise to legal obligations and rights for which there is a remedy at law. The nature of the distinction between the second and the third set of injunctions according to this classification is recognized by the author of the Dayabhaga. In commenting on the verse of Manu which says: "To the unmarried daughters, let the brothers give portions out of their own allotments, respectively, according to the classes of their several mothers; let each give a fourth part of his own distinct share, and they who refuse to give shall be degraded," Jimutavahana argues that since degradation and not amercement is provided for if they refuse to give the allotment, the daughters have no legal right to a share. (Cole Dig. vol. II, p. 294). Judged by this test, the injunctions in respect of giving daughters and wards in marriage give rise to no legal obligations and rights and are merely moral precepts whose violation is an offence under the Moral Code only.

Again, if the obligation of a father or those named after him in succession to marry his daughter or their wards were a legal one,

to whom do they owe the legal duty? Is it to the society or the individual? It cannot be the former; for society has no means of enforcing the obligation. There is no remedy at law provided in that case; nor is the breach of the obligation to get the daughter or the ward married made indictable under the provisions of any penal code obtaining in the land. And as there can exist no legal obligation without a remedy for its breach under any circumstances, it cannot be said the father or other guardian is under a legal obligation to society to see his daughter or ward married.

Nor can it be maintained that the obligation is one which the father or other guardian owes to the daughter or the ward; for even here, the daughter or the ward has no means of enforcing the obligation. It is evident that the father or the guardian cannot be compelled, at suit of the daughter or the ward or somebody in their behalf to specifically perform his legal duty. It may, however, be contended that the Hindu law recognizes a remedy in that the father or the guardian may be compelled, on breach of this obligation, to defray the expenses of the marriage of their daughters or wards. But a close study of the *Smritis* shows that the father or the guardian is under no such obligation. Manu says: "Three years let a damsel wait, though she be marriageable; but after that time let her choose for herself a bridegroom of equal caste and rank. If, not being given in marriage, she herself seeks a husband, she incurs no guilt nor does he whom she weds. *A maiden who chooses for herself shall not take with her any ornaments given her by her father or her mother or her brothers; if she carries them away, it will be theft.*" (Manu, chap. IX, 90, 91 and 92.) Far from recognizing any right on the part of the daughter to recover her marriage expenses from the father the italicised portion of the text quoted clearly enjoins the daughter choosing a bridegroom for herself to restore to the father, mother and brothers any ornaments which she might have received from them before her marriage. Again Narada says: "Let a maiden be given in marriage by her father himself or by her brother with the father's authority or by her paternal grandfather or by her maternal uncle or by her agnates or cognates. In default of all of these, by the mother in case she is competent to act as guardian; if she be wanting in competence, the distant connexions shall give

a maiden in marriage. If no such be in existence, let the maiden have recourse to the king, and let her with his permission betake herself to a bridegroom of her own choice." (Narada, chap. XII, 20, 21 and 22.) Narada then branches off to another subject. Thus there is nothing here to indicate that the father or any other person on whom the duty devolves in succession is bound to defray the expenses of the marriage. Furthermore, Manu treats the daughter as the property of her father and the subject of gift. Manu says: "He who takes to wife a marriageable damsel, shall not pay any fee, to the father, for the father has lost his dominion over her in consequence of his preventing the legitimate result of the appearance of her menses, *i.e.*, in consequence of his not having married her before she attained puberty." (Manu, chap. IX, 93.) In support of the position that brothers are under a legal obligation to defray the marriage expenses of their unmarried sisters, reliance is often placed upon the following texts:—"To the unmarried daughters let the brothers give portions out of their own allotments, respectively, according to the classes of their several mothers; let each give a fourth part of his own distinct share; and they who refuse to give shall be degraded." (Manu, chap. IX, 118.) "The marriage and other ceremonies of unmarried daughters must be defrayed in proportion to the wealth inherited." (Vishnu, chap. XV, 31). A nuptial portion shall be given to unmarried daughters *out of their father's estate.*" (Devala.) "For any of the brothers whose investiture and other ceremonies had not been performed, the other brothers of whom the sacraments have already been completed shall perform these ceremonies *at the expense of the paternal estate;* and for unmarried sisters, the sacraments shall be completed by their *elder brothers* as the law requires." (Vyasa.) "For any of the brothers whose investiture and other ceremonies had not been performed by the father, those ceremonies shall be performed by brothers of whom the sacraments had been completed; and for their sisters by giving a fourth part of their shares." (Yajnavalkya, chap. II, 124.) "For unmarried daughters a fourth share is ordained and three shares for sons; but if the estate be small, a daughter is considered as having a right to a *sufficient portion, without determining the rate*" (Katyayana.) These texts are found, in the chapter on 'Inheritance' and 'Partition among brothers after

their father's death' in the *Smritis* from which they are respectively taken and it is therefore argued that the brothers are under a legal obligation to defray the marriage-expenses of their unmarried sisters. One objection that can be urged against this view is that the injunctions contained in all these texts are, as has been pointed out above, merely directory and not mandatory. If, for instance, the text of Manu, chap. IX, were held to contain a mandatory injunction, the effect of it would be, as is pointed out in page 294, vol. II of Cole, Digest, to deprive a son of all his patrimony where he has four unmarried sisters and to place him in a very unenviable position if he has five—a state of things hardly consistent with the pre-eminent position of the son in respect of his father's property unanimously conceded by all the Smriti-writers. These rules must, therefore, be understood as only recommendatory. Again these texts make it abundantly clear that the obligation, if any, imposed by them on brothers in respect of the marriage of their unmarried sisters is not an absolute but a conditional one. These texts agree in making the obligation not a personal one founded on the relationship of brother and sister, but one dependent upon the fact of the brother's inheriting assets from their father. The text of *Yajnavalkya* above cited is significant as clearly implying a distinction between the nature of the obligation of brothers to perform the investiture and other ceremonies of brothers and their obligation to perform the marriage of their unmarried sisters. While the former is made absolute and independent of any patrimony inherited by the brothers, the latter is made to depend upon, and vary in proportion to, the father's estate inherited. Narada is clearer than Yajnavalkya on this point : "To the eldest (son) a greater shall be given ; a worse share is ordained for the youngest ; the rest shall have equal allotments, and an unmarried sister shall also have a portion. For any of the brothers whose investiture and other ceremonies had not been performed by the father in due order, the other brothers shall perform those ceremonies at the expense of the paternal estate. Or if no property of the father remain, the investiture and other ceremonies must be performed out of their own shares by brothers for whom those ceremonies have already been performed." (Narada, chap. XIII, 13, 33 and 34). The omission of all reference to the unmarried sister in the latter portion of the passage just above quoted is a clear denial of all

obligation on the part of brothers in respect of the marriage of unmarried sisters, where the former have no assets of the father to inherit.

Now coming down to modern text writers on Hindu-Law and Usage, we find that they are silent on many of the points raised in this paper. They agree in speaking of the *duty* of the father to get his daughter married, but have nothing to say as to whether such a duty is a moral or a legal one, whether it is an absolute one solely resting upon the existence of the particular relationship, or whether it is dependent on the possession of property. Mr. Mayne in the chapter on Maintenance doubts whether the obligation to maintain is based upon mere relationship or is dependent also on the possossion of property (S. 409). He quotes a verse from Manu, which is not found in the translation of Manu in the Sacred Books of the East series, but found in Mandlik's Edition, p. 1347, and also cited in Mit, chap. II, 177. Even this verse refers distinctly to the *infant son* and not to the daughter. He also relies on West and Buhler, pp. 245 and 437, as showing that brothers are under a legal obligation to maintain and defray the marriage expenses of their unmarried sisters. The authority of West and Buhler again rests on the Smriti Chandrika, the only treatise on Hindu Law which makes the brother's legal obligation independent of the question whether the brothers had inherited assets from the father. The other texts relied on by West and Buhler have already been quoted and observed upon in this article. Mr. Bhattacharji, while conceding that there is no express text in Hindu law books laying down the legal liability of the father to maintain and marry his unmarried daughter deduces the rule from the passage of Mitakshara (Col. Mit. X, 13) which lays down the rule for the maintenance of the daughters of disqualified persons. He argues that the right of one's own daughters in this respect cannot reasonably be less than that of the daughters of his disqualified co-parceners. But the conclusion, I fear, is not warranted by the premises. The obligation of a person to maintain and marry the unmarried daughters of his disqualified co-parceners is evidently not based upon his relationship to the owners of the right, but upon the fact that their father is disqualified to inherit and therefore makes the co-parcener richer by the share of joint property to

which but for his disqualification he would be entitled. This is a reason why the daughters of disqualified co-parceners are justly entitled to greater rights than those of other co-parceners.

The case-law on the subject is also extremely meagre and unsatisfactory. There yet has been no case in which the legal liability of the father to maintain or marry his daughters was directly in issue. Much of the little case-law on the subject is directed to the question of the relative rights of guardians to dispose of the girl by way of marriage. There are also elaborate discussions as to whether the father owes a duty or is clothed with a right to marry his daughters; but whether the duty is a moral or a religious one, or whether it amounts to a legally enforceable obligation has never formed the topic of discussion. The only case where observations of Judges are found on this point is that of *Namasevayam Pillay* v. *Annammai Ummal* (4 M. H. C. R., 339). There their Lordships say: "It would seem from the express provision made by the law for the choice of a husband by a girl herself in case of neglect on the part of her relatives of their duty to betroth her for three years from the time she became marriageable (Manu, chap. IX, Sl. 90 and 91; 1 Strange's Hindu Law, 36), that the duty does not amount to an enforceable legal obligation." These observations were, indeed, unnecessary for the purposes of the judgment in that case; but, nevertheless, the reasoning appears to be sound enough. In *Mansha Devi* v. *Jiwan Mal*, I. L. R., 6 A., 617, the plaintiff claimed a sum of money against the defendant to meet the marriage-expenses of his unmarried daughters; but the court held that as no marriage had been celebrated or expenses incurred, the claim was premature. In *Tulsha* v. *Gopal Raí*, I. L. R., 6 A., 632, the plaintiff claimed a sum of money from the defendant in the matter of the marriage of the defendant's sisters, the defendant being admittedly in possession of his father's assets.

To sum up, it can without much hesitation be concluded that marriage is optional for women, especially of the Sudra class, that the father's obligation to marry his daughter is a moral duty, not legally enforceable, and that the obligation of brothers and others to marry their sisters and wards is conditioned upon their having inherited the assets of the father of the latter.

S. SITARAMA SASTRI.

INSANITY IN HINDU LAW.

Insanity as a juridical fact is taken notice of in all systems of jurisprudence, and it stands to reason that it should be so. As is said by a well-known writer on Lunacy, "there is found within the "State a class of persons who, though sharers in the common "humanity, can neither exercise the rights, nor perform the duties "of citizenship; who are more than other persons liable to injury "from themselves or others, yet are unable on their own behalf "to call for protection; who finally are more than others liable to "injure society, yet are neither amenable to its influence, nor "bound by its ordinary laws. Where the conditions are so pecu-"liar, the rules regulating them will be peculiar also. The absence "of reason creates in fact an elementary difference in the relations "of the individual to the State and the law of the State. Among "all the varied circumstances of life there is scarcely one but "is affected by it." Pope on Lunacy, (2nd Ed.), p. 5. We find, therefore, special laws made for this special class of persons in all systems of law.

Insanity is defined by the same writer "as a defect of reason consisting either in its total or partial absence, or in its perturbation," p. 1. Inasmuch as there are various degrees of perturbation of reason, and also various degrees in the partial absence of reason, English writers, both medical and legal, have divided insane persons in various and perplexing ways. And in English Law we find insane persons subject to disabilities, or possessing immunities in various departments of law, and a man may be insane for one purpose while he may not be considered to be insane for another. Thus in English Law.

i. An insane man is incapable of entering into a contractual relation. The test of insanity being whether the insane man was capable of understanding the nature of the act he was performing.

ii. An insane man may be incapable of making a will; the test being whether the testator had such memory as would enable him to know what his property was and who those persons were who were at the time the rational objects of his bounty.

iii. An insane man may not be responsible criminally. The test in this case being whether he was capable of knowing right from wrong.

iv. An inquisition in lunacy may issue; the test being whether the person is of unsound mind and incapable of managing himself and his affairs.

v. The insane man may be confined in an asylum; the test being whether the alleged lunatic is dangerous to himself or to others, and a proper person to be taken charge of and detained under care and treatment.

vi. The insane man may be incompetent to give evidence; the test is whether the lunatic is capable of understanding the questions put to him and capable of answering intelligently.

See Pope on Lunacy, p. 20.

In Hindu Law also we find the following classes of cases provided for:—

i. Insane persons and idiots are not competent witnesses. (See Vishnu, Ch. VIII, verse 2; Brihaspathi, Ch. 7, verse 30; and Manu, Ch. VIII, verse 67.

ii. Insane persons are not competent to contract. (Colebrooke's Digest Book 3, Ch. 3, S. II, verse 37.)

iii. It is also stated that a plaint or answer should be presented by a kinsman on behalf of madmen, idiots or the over-aged. (Brihaspati.)

iv. And, lastly, we have the well-known rules as to exclusion from inheritance:—Eunuchs and outcasts, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage. (Manu, Ch. 9, v. 201.) An outcast and his son, an eunuch, one lame, a madman, an idiot, one born blind, and he who is afflicted by an incurable disease, must be maintained without any allotment of shares. (Yajnavalkya, Ch. II, v. 140, Mandlik, p. 223.) Except the last, the other cases of disability are now regulated by statute, and the only cases of practical importance, which require to be decided by the rules

of Hindu Law, are those relating to exclusion from inheritance, and we propose to discuss them in the following order:—

i. What is the legal criterion of insanity or idiocy which excludes a person from inheritance?

ii. What is the effect of exclusion from inheritance as long as the excluded person is insane?

iii. What is the effect of the excluded person recovering his sanity?

And under the last head (*a*) when the person is excluded from a share in joint family property; (*b*) when the person is prevented from succeeding by inheritance.

Before proceeding further, we may here observe that the principle of exclusion on account of certain disabilities is not peculiar to Hindu Law; but we find similar rules laid down in other systems. In all early states of society where the communal form of property is prevalent, and where the idea of individual proprietorship is still unknown, or is yet struggling for recognition, where securing the property is more a matter of might than of right, we find this principle of excluding a feeble member of a family from participating in its property. Incapacitated persons are not useful for acquiring property for the family or for preserving it from the interference of strangers. For instance, we find it laid down in the Civil Law:—"Lunatics too, the deaf and the dumb, the incurably diseased, must have curators given them, for they cannot direct their own affairs. If a man is mad or a spendthrift and has no guardian, let his *agnates* and men of his *gens* have power over him and his money. (Hunter's Roman Law, p. 732.)

The following summary is given of the old Anglo-Saxon Law of Germany on this subject:—" Outcasts, illegitimate children, monks and nuns, one who has killed his father or other relative whose presumptive heir he is, or who has forcibly dispossessed him or robbed him of his property, these persons are entirely incapable of inheriting. Dwarfs, helpless cripples, persons of neutral sex, and lepers are equally disqualified, but their next of kin have the duty of maintaining them. The deaf, the dumb, the blind and the lame as well as those who have no hands or feet may inherit ordinary property." (See Jolly, p. 282.)

The modern Commission of Lunacy seems to have had its origin in similar rules of exclusion. Under the Common Law the Lord of the fee took possession of the estate of his insane tenant and provided him with necessaries. As this duty was not properly performed, the king took charge of the same. There was a distinction drawn between the estates of '*idiots*' and those of lunatics. The king had possession of the estates of the idiot and enjoyed the profits after providing for the necessaries of the idiot; while in the case of lunatics, he was only a trustee of the estate for the lunatic, and on his death, the profits were used for the benefit of his soul. (Pollock and Maitland's History of English Law, pp. 463 and 464, and I Blackstone, ch. VIII, p. 352, and 17 Edward II, Cc. 9 & 10.)

It must also be remembered that in English Law a person born deaf and dumb, or born deaf and blind was presumed to be an idiot. (Coke on Littleton, 426.)

Again, a conviction for felony or treason till recently corrupted the blood and prevented descent being traced from the convicted person and the property escheated to the Lord of the fee. (See Stephen's Criminal Law, vol. 1, p. 487.)

No doubt the harshness of these rules has been much softened in modern times in the other systems of law; but as the Hindu Law became stereotyped centuries ago, there has been no corresponding progress therein; and in interpreting and giving effect to the rules relating to exclusion this must be specially borne in mind.

I. Now coming back to the first division of our subject, we have to enquire what is the nature of the idiocy or insanity which works exclusion.

An idiot is defined in the Mitakshara as a person deprived of the internal faculty, meaning one incapable of discriminating right from wrong; and it has been held that idiocy to work exclusion need not be total mental darkness. (*Tirumamagal Ammal* v. *Ramasvami Ayyangar*, 1 M. H. C. R., 214.) It is said that if the person is from his birth of such an unsound and imbecile mind as to be *incapable* of instruction, he is disqualified. (See also *Surti* v. *Narain Das*, I. L. R., 12 A., 530.)

Idiocy again is always congenital. A high authority on Medical Jurisprudence says, "idiocy is the *dementia naturalis* of lawyers.

The term idiot is applied to one who from original defect has never had mental power. Idiocy differs from the other states of insanity in the fact that it is marked by congenital deficiency of the mental faculties. (Taylor Med. Juris, vol. 2, p. 489) (3rd Edition), and Coke defines an idiot as he who from his nativity, by a perpetual infirmity is *non compos mentis*. (CoLitt 247a.)

The question whether a person is an idiot involves little difficulty in practice, though it is difficult to draw a clear line between an idiot and one who is only deficient in ordinary intelligence.

As to the case of insane persons there is some difference of opinion as to whether insanity also need be congenital. The Allahabad and Calcutta High Courts have now held that it need not be. (*Deo Kishen* v. *Budh Prakash*, I. L. R., 5 A., 509; *Ram Sahye Bhukkut* v. *Lalla Laljee Sahye*, I. L. R., 8 C., 149; *Wooma Pershad Roy* v. *Grish Chunder Prochundo*, I. L. R., 10 C., 639. Also in an unreported case in Madras it was held that it need not be congenital; while in the case of *Gokul Das* v. *Parvati Bai*, I. L. R., 1 B., 177, *Westropp*, C. J., in discussing whether blindness to cause exclusion need be congenital, expressed a strong opinion that insanity also must be congenital. It may not therefore be out of place to see how far the opinion of the Bombay High Court is supported by the original texts or their commentaries. There is no text which affirmatively lays down that insanity should be congenital.(1) On the other hand, the text of Manu clearly implies that it need not be. He says, "*Anamshau kleebapathithou jathyandha badhirau thathah-Unmaththa jada murkhascha ye cha ke chinnirindriyah.*" "Eunuchs and outcasts, persons *born blind or deaf*, madmen,

(1) The texts from the leading Smritis are as follows:—

Yajnavalkya, Ch. II, V. 140. An impotent person, an outcast and his issue, one lame, a madman, an idiot, a blind man, and [one] afflicted with an incurable disease are [persons] not entitled to a share; and are to be maintained.

Narada, Ch. XIII, V. 22. Persons afflicted with a chronic or acute disease or idiotic, or mad or blind or lame (are incapable of inheriting). They shall be maintained by their family; but their sons shall receive their respective shares of the inheritance.—Jolly.

Devala Cit Colebrooke:—On the death of a father *or other owner of property* neither an impotent man. . . . not a madman, not an idiot, nor one born blind, . . . shall take any share of the heritage. For such men . . . let food and clothes be provided, &c.

idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage." It will be observed that the word 'born' qualifies only the blind and the deaf and forms with them one compound word "*Jathyandha badhirau*" and the class *madmen* is not one of those qualified by the word 'born.' On the principle of *expressio unius exclusio alterius* (which is also recognized as a principle of interpretation in Hindu Law) it is inferable that madness need not be congenital.(2) In the text of Yajnavalkya the word 'born' is not used to qualify any of the classes of disqualified persons though in the translation of Colebrooke the word 'born' is introduced to qualify 'blind and deaf.' In the text of Narada as quoted in the Digest we have "insane, blind or lame from his birth" (Cole. Bk. V, Ch. V, Sec. 1, Vers. cccxx); according to this reading 'from his birth' qualifies 'insane' also. But Jagannatha also notices another reading of the same text 'idiot, insane, blind or lame' as found in *Vivada Chintamani*, though Jagannatha seems to prefer the former reading. Dr. Jolly has examined several manuscripts of Narada Smriti and in not one of them do we find the former reading, and he tells us that the former reading must be a mistake. Such a mistake could easily have been committed by a copyist, for though the sense is so much changed the variation in the reading itself is very little. Instead of '*Jadonmaththa*' as in the latter, we have '*Janmonmaththa*' in the former reading. We find also stated in the preface to the said Smriti that it is only an abstract of the Manu Smriti and the text of Manu rather leads to the inference that insanity need not be congenital, and it is unlikely that Narada would have introduced such an important change. Again, if the first reading is correct, Narada does not mention an 'idiot' '*jada*' as one of the disqualified persons. No doubt it might be said that an 'idiot' would be included in the class 'mad from birth,' but Sanscrit writers do make a distinction between madness and idiocy and use different words for that purpose, and there is no reason to suppose that Narada did not follow this and use the commonly used word 'jada' for an idiot.

On the strength of this doubtful reading of Narada, Jagannatha interprets 'Insane' 'as congenitally insane' in a text of Devala "... neither an impotent man . . . nor a madman, nor an idiot, nor one (born) blind . . . shall take any share of the heritage."

(2) See Smriti Chandrika, Ch. V, V. 30. Krishnaswamy Aiyar's Translation, p. 72.

He says 'a madman in the text of Devala signifies one insane from birth; for the import is the same with the text of Narada. Cole. Bk. V, Ch. V., Sec. 1, V. 326.

But Jagannatha too seems to think that even subsequent insanity would be a bar if it be ascertained to be the mark of a heinous crime.

Another reason for holding that madness need not be congenital is that both 'idiots' and madmen are mentioned in the texts as being excluded. Idiocy, we have seen, is always congenital, or at least one becomes an idiot owing to arrested development in the very early years of infancy, while madness is a disease affecting a healthy and well-formed intellect. The Mitakshara defines a madman as one affected by any of the various sorts of insanity proceeding from air, bile, phlegm, from delirium or planetary influence (Stokes H. L. p. 455, Mit. Ch. II, Sec. X, pl. 2), thus treating it as a disease; and Apararka defines *unmatta* as one afflicted with the illness *unmáda* (mania) cit. Jolly p. 275. We are not aware that 'madness,' strictly speaking, could at all be congenital; and if we wish to give any meaning to both the words in the texts, we are bound to take it that madness need not be congenital and means the disease which attacks a developed brain.

Again the reason stated by Hindu writers for exclusion is that the disqualified persons are not capable of performing religious rites, and that the heritage is the reward for the performance of such ceremonies. If so, one who is mad at the time of partition or when succession opens is equally incapable of performing religious ceremonies with one who has been so from his birth.

One argument may perhaps be advanced in favour of holding that 'madness' equally with 'blindness' and 'deafness' should be congenital, viz., that in the texts of Yajnavalkya, Narada, and Devela, all these are treated in the same manner, and the word 'born' is not used to qualify any of them; and as it is now held that blindness and deafness must be congenital, so also insanity should be. One obvious answer to this is that 'madness' is never congenital: another is that these Smriti writers are later than Manu, and they lay down the same rules as in that Smriti; and the qualification

"from birth" is introduced by the commentators on the authority of Manu.

It is unnecessary to refer to the cases in the Privy Council where it has been assumed that insanity need not be congenital to work exclusion (See *Baboo Bodhnarain* v. *Baboo Omrao*, 13 M. I. A., 519; *Kooer Goolab Sing* v. *Rao Kurun Sing*, 14 M. I., 176). A commentator of Manu (Narayana) has said that madness must be incurable. No other commentator has introduced this qualification, and the Allahabad High Court in the Full Bench Case already cited has held that it need not be incurable. I. L. R., 5 A, 509.(1)

Another question with reference to 'madmen' is the kind of 'madness' which disqualifies. As already stated what may be legal madness for one purpose may not be legal madness for another purpose. The test we would suggest is whether the 'insane person' is incapable of managing his affairs and to take care of himself and his property—in fact, the test adopted in English Law for the issue of a commission in lunacy. The original principle underlying the modern issue of a commission in lunacy and the principle of exclusion in Hindu Law as already noticed seem to be the same. In both the insane person was excluded from meddling with the estate and from the enjoyment of the profits. In both the insane person and his family were entitled to maintenance. In both after the disqualification ceased, the insane person was entitled to have the property back. No doubt under the peculiar system of tenure in England, the Lord of the fee, and afterwards the king as the superior landlord had possession of the disqualified person's estate; while in India the estate was given to the next heir subject to its being restored on the restoration of sanity. In both, the result sought to be obtained was the same, *viz.*, the preservation of the property intact to provide for the maintenance of the insane person and to keep it for his heir. No doubt there is some difference in the conception of the right of the insane in the different systems, and it has led to some difference in the legal conse-

(1) Professor Sarvadhikari is of opinion that insanity too should be congenital, for, he says in the text of Manu the word 'born' qualifies blind, deaf and insane as they all form one compound word and 'born' must qualify all the members of the compound. We quite agree that the conclusion of the learned Professor would be correct if the words blind, deaf and insane formed one compound word, but in the text of Manu they do not.

quences. For instance, in English Law the king was held to be the trustee of the estate of a lunatic (though not of an idiot) and was bound to account to the lunatic or his heirs, while the next heir in the Hindu Law is the owner of the estate as long as he is in possession. But the principle of both is the same, and it will be a safe guide to take the test in English Law in deciding on a man's insanity to exclude him from inheritance in Hindu Law.

As far as we are aware, the question has not been discussed in the reports or by text writers and in practice there is not likely to be very much of difficulty.

II. What is the effect of exclusion from inheritance as long as the disqualification lasts? It is laid down generally that the insane person is excluded from participation of the heritage. We have to bear in mind that an insane person may be disallowed a share on partition of joint family property, or may be excluded from succeeding to the property of a collateral or in the case of the Dayabaga Law to a lineal ancestor. The Hindu Lawyers do not often make a distinction between the two and the various texts which speak of exclusion generally refer to exclusion from a share of the heritage. The person who is excluded (as also his wife) is entitled to maintenance from the persons who take his share. His daughters too are entitled to maintenance till they are disposed of in marriage and to the expenses of their marriage.(1) Yajnavalkya mentioning the disqualified persons says they "must be maintained without any allotment of shares:—Their daughters must be supported so long as they be not disposed of in marriage; and their childless wives who preserve chastity must be supplied with food and raiment. Yajna, ch v. :—There can be no doubt that a member of a joint family who is unable to take his share on account of his infirmity is entitled to maintenance for himself, his wife and his daughters from the family property; for at the time of partition he is a member of the joint family and the maintenance of the members of the joint family who do not get or cannot get a share of the property has to be provided for in the first instance and only the remaining property could be divided among the sharers. (It must also be recollected that, under the early law, on a partition even the

(1) Whether the excluded person and others would be entitled to maintenance, &c., where he is prevented from succeeding *to a collateral*, is noticed later on.

female members were entitled to certain shares in lieu of their maintenance and this principle is still acted upon in some cases under the Bengal Law). The insane man does not in fact cease to be a member of the family.

Even under the Bengal Law the insane person and others have to be maintained out of his father's property (see the observations of *Norman, J.*, in *Callydoss Doss* v. *Krissan Chunder*, 11 W. R. Appeals from Original Jurisdiction, p. 11 at p. 12). Though the son does not acquire a right by birth in the father's property, he is still entitled to be maintained by his father, and when on the death of the father the son gets a share, the lesser right of maintenance is merged in the higher right. But if the higher right does not accrue owing to a disability the lesser right still subsists and the disqualified person is entitled to be maintained by those who take his share of the father's property.

But in cases where an insane person is excluded from succession to the property of a collateral, the person who actually succeeded to the exclusion of the insane man, would not be bound to give any maintenance to him or his wife or daughters; for in these cases the insane person had no right at all in the property of his collateral relation and the loss of his right to succeed could not create a new right to maintenance; while in the case of a joint family, and in the property of a father in Bengal, the members of that family and the sons respectively have a right of maintenance at the least; some of them have the further right to demand partition, or possess the right of participation. It is only this last right which is taken away by reason of a person being insane; and in consequence thereof the lesser right is recognized and given effect to. In cases of collateral succession on the other hand an insane person is simply considered to be non-existent and the inheritance goes to the heir next after him without any liability attaching thereto. The author of the Smriti Chandrika seems to hold the same view. Commenting on a text of Katyayana, he says: "The meaning is Manu and others consider that food and raiment are to be supplied to him who is excluded from inheritance by those who take his *father's* wealth . . . . . That where kinsmen have not taken the estate of *the father* of one who is excluded from

inheritance they are not to be compelled by the king to pay him maintenance." Smriti Chandrika, ch. V, S. 24. All the daughters of the insane man would be entitled to maintenance whether they were born at the time of partition or succession, or after.

It is also laid down that if a son is born to a disqualified person, he is capable of inheriting, or is entitled to a share. "If the eunuch and the rest should *at any time* desire to marry . . . . that son and the issue of such as have children shall be capable of inheriting." Manu, ch. IX, V. 203.

"But their sons, whether legitimate or the offspring of the wife by a kinsman, are entitled to allotments if free from similar defects." Yaj., ch. II, V. 141. In the Dayabagha, ch. V, V. 19: "But the sons of such persons being either their natural offspring or issue raised up by the wife as the case may be are entitled . . . to take their allotments according to the *pretensions of their fathers*," and in a previous verse 11 it is said that such sons obtain their father's *share* of the inheritance.

The author of the Mitakshara lays down the rule in almost similar terms, and he says that this rule was laid down, as the disinherision of the disqualified persons seemed to imply disinherision of their sons. Mit. ch. II, sec. 10, V. 9.

It may also be stated that the son of *an outcast* is not entitled to inherit and is an exception to the rules laid down above.

The above are the texts from the leading authorities of both the Bengal and Mitakshara Schools and the following questions arise with respect to the rights of the sons of disqualified persons:—

(*a*) Whether they would inherit the property of a collateral, which their father would have inherited except for the disqualification.

(*N.B.*)—In principle there could be no difference on this point between the Mitakshara and the Bengal schools.]

(*b*) Whether under the Dayabagha they would be entitled to their father's share in the grandfather's property, if they were born at the time of the grandfather's death.

(c) Whether they would be entitled to their father's share in the grandfather's property, if they were born subsequent to his death.

(d) Whether under the Mitakshara they would be entitled to their father's share, if they were born at the time of partition.

(e) Whether they would be entitled to their father's share, if they were born subsequent to partition.

We proceed to answer the above questions in their order :—

(a) It will be observed that the texts do not lay down that the sons of the disqualified persons *represent* their father for all purposes. They merely declare that the sons are capable of inheriting; in fact their father is capable of transmitting *heritable blood* as distinguished from the father of an outcast. Again under Hindu Law the right of representation holds good only to a limited extent, and a son cannot represent his father for purposes of succession to the estate of a collateral. If on the death of a collateral the insane man happens to be the nearest heir, he will be considered as dead, and the estate will pass to the next in the line of heirs after him. If that next heir happens to be his own son, the son will succeed. But if that next heir be another person, that other will succeed to the exclusion of the insane person and his sons. While discussing the rights of maintenance of the insane man and his issue we had occasion to observe that the disqualified person had no sort of interest in the estate of a collateral taken by the next heir to his exclusion. The right principle in this class of cases is to consider the disqualified person as dead and the right of his sons to succession is to be treated in exactly the same manner as if the insane man were dead. *A fortiori* the son of a disqualified person who is born after succession opened is incapable of representing his father and obtaining the property which his father but for his disqualification would have inherited.

(b) This class of cases presents no difficulty as it is directly covered by the authority of the texts. Under the Dayabagha, property in the sons arises by the *death* of the father, and the sons, grandsons, and greatgrandsons, succeed to the property of the propositus. In succeeding to the estate of a lineal ancestor, the

sons, &c., represent the father, &c., so that if one of the sons of the propositus is dead leaving a son, the latter would be entitled to his father's share of his grandfather's property. Likewise if one of the sons is insane and is therefore not entitled to take a share, his son who is not similarly disqualified would be entitled to take the share of his father as if he were dead.

(c) In this group there may be two classes of cases: first, where a son is born to the disqualified son subsequent to the death of the grandfather, but before *partition* of the property by the sons; second, where the son is born subsequent to the death of the grandfather and subsequent to partition among the brothers. Under the Dayabagha law there is really no difference between the two classes of cases so far as the rights of the son of a disqualified person are concerned. It will be remembered that under the Dayabagha the sons do not acquire a right by birth to the estate of the father. In all cases where the sons obtain the property of a father, they obtain it as his heirs and the property vests in them as tenants in common and not as joint tenants with rights of survivorship. Their shares are not liable to be diminished or increased as in a Mitakshara family by the addition to or diminution of the members of the joint family; no one who is not alive at the time of the father's death takes a share in his property except an after-born son. Partition among them does not create any new rights, nor divest any vested rights, and the son of a disqualified son if he is entitled to obtain a share in the grandfather's property even though born subsequent to his death, would not lose it, because the sons have made a partition of the property, and likewise, if he would not be entitled to a share after partition, he would equally be disentitled to get a share before partition. Therefore, the only question to be considered in this connection is whether the son of a disqualified son born after the death of the grandfather is entitled to get the share of his father divesting it from any intermediate owner. This question was decided in the negative by a Full Bench of the Calcutta High Court in a case reported in *Kalidas Das* v. *Krishna Chandra*, 2 B. L. R. (F.B.), p. 115. There the original owner of the property died leaving a blind son, some widows and a nephew, the son of his brother. After the death of the last surviving widow, the estate descended to the nephew. Subsequent to this a son was born to the blind man, and the son sued to recover the property

from the nephew. *Norman*, J., who originally tried the case, held that the grandson was entitled to recover. From this decision there was an appeal, and it was held following an earlier decision in *Pareshmani Dasi* v. *Dinanath Das*, 1 B. L. R. (A. C. J.), p. 117, that the property having vested in a full owner could not be divested by the subsequent birth of a son. The decision on appeal was based on the definition of heritage by Jimutavahana and also on the ground "that there was no case in which an estate vested in a male heir by inheritance can be divested by the adoption of a son by a widow after her husband's death." Heritage is defined by Jimutavahana to be wealth in which property dependant on relation to the former owner, arises on the demise of the owner. Day, ch. I, v. 5. Under the Bengal School of Law property for the first time vests in the sons on the death of the father, and if one of the sons is dead or insane, his share will pass to the son of the deceased or disqualified son (if he has any) on the principle of representation allowed in *lineal descent* under Hindu Law. But if the deceased or disqualified son has no son living at the time when property vests, *viz.*, on the death of the father, then the whole property vests in the other sons. The only case in which the property which is so vested in the other sons would be divested is the birth of an after-born son which could happen only when the mother is *enciente* at the time of the father's death. In this case, however, the after-born son's right dates from the time of his conception. Their Lordships, the Judges of the Calcutta High Court, therefore say that as no property vests in the disqualified son at the time of his father's death, and as he has no son then living to represent him and take his share, his after-born son does not get any share or obtain any interest in his grandfather's property. Their Lordships also discuss the texts of the Mitakshara on this point and refer to the analogy of the after-born son therein referred to. They give a narrow interpretation to the text of the Dayabagha which says that the son of a disqualified person gets his father's share, and say that it merely declares that the sons have heritable blood; and restrict the text to those cases where the son of a disqualified son is living at the grandfather's death.

On the other hand it must be remembered that the laws relating to exclusion belong to an archaic state of society, that these penal provisions ought to be strictly construed; while the rules

which allow the resumption of or create new rights ought to be liberally construed. Under the ruling of their Lordships in the above case the disqualified person and his *daughters* would be entitled to maintenance while his *son* would not be entitled to it, as no provision is made for the maintenance of the sons. If there is any peculiarity in Hindu Law, it is its great anxiety to provide for the maintenance of all the members of the family out of joint funds, and it would be very surprising, if the son is held not entitled to any maintenance while the daughters are entitled to the same. This suggests the inference that the son whenever born would be entitled to take the father's share divesting it from the hands of any intermediate owner. *Mr. Justice Norman* refers to the verse of Manu, which says that 'if the eunuch and the others should *at any time* desire to marry and have sons, these sons would be entitled to their father's share." The words *at any time* strongly point to the conclusion that even an after-born son would get his father's share. Again it is not correct to say, as the learned Judges of the Calcutta High Court have said, that there is no case in which an estate vested in a male can be divested by adoption by a widow after her husband's death. For instance in every joint Hindu family under the Mitakshara Law if a member dies leaving his widow a power of adoption, by her adoption she necessarily divests the other members of the family of her husband's share; and this happens whether the other members have divided or have remained joint. We may also refer in this connection to the case of *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R., 3 I. A., p. 164. In this case A and B were brothers and members of a joint Hindu family owning an impartible zemindary descendible by the rule of primogeniture. A was the last Zemindar. He died giving his widow a power to adopt. On the death of A without issue, B succeeded to the zemindari by survivorship. A year after the death of A his widow adopted a son and the adopted son was held entitled to the property, thus divesting the estate vested in his uncle B. This case had not been decided at the time of the decision of the Full Bench case in 2 B. L. R. This is a case from Madras, and it will be seen that a case of this sort could not arise in Bengal. But that, it is submitted, does not make any difference in principle, for at the time when the property vested in B, there was no member of the joint family who had any right therein or had any vested interest in it. If again, for example, the

property instead of being indivisible had been ordinary divisible property and B. had succeeded to the whole, the joint family would be at an end; but all the same, on the adoption of a son by A's widow that son would be entitled to his father's share. In these cases the estate taken by an intermediate owner is in the nature of an estate in fee simple subject to a condition subsequent, on the happening of which the estate shifts to another person. If the happening of the condition becomes impossible, the estate becomes absolute. We submit that the estate taken by a person in supersession of a disqualified sharer is of a like nature, and on the happening of the condition subsequent which is the birth of a qualified son to the disqualified person, the estate shifts to that son. No doubt there is a limit now placed by the decisions to the time within which a power of adoption could be exercised so as to divest an estate, after which it is held to be void. It will be seen that from the nature of the case a limit is placed also in the case of divesting by the son of the disqualified person, *viz.*, the lifetime of the disqualified person; for it is laid down that his adopted son could not take his share.

The case of *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R., 3 I. A., 164, was referred to in two Calcutta cases. (See *Kally Prosonno* v. *Gocool Chunder*, I. L. R., 2 C., 295, and *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri*, I. L. R., 7 C., 178). In both these cases it was held that succession cannot be held in abeyance till a preferable heir comes into existence, but the person who is the heir at the time when succession opened will be the absolute owner and the subsequent coming into existence of a preferable heir by means of an adoption would not entitle the adopted son to recover the estate. In the former of the two cases the Privy Council case was distinguished on grounds which are clearly incorrect. In the latter the case was distinguished on the ground that it was a case of 'lineal succession,' see at p. 189. Both the Calcutta cases were cases of collateral succession. The latter case went up to the Privy Council and the Judicial Committee while affirming the judgment of the High Court say, "According to the law as laid down in the decided cases an adoption after the death of a *collateral* does not entitle the adopted son to come in as heir of the collateral." See *Bhubaneswari Debi* v. *Nilcomul Lahiri*, I. L. R., 12 C., 18. Applying the same analogies in cases of collateral

succession, the subsequent birth of a son to the disqualified person would not entitle the said son to stand in the shoes of the father and obtain the property which his father would have succeeded to but for his disqualification. But in cases of *lineal succession* the after-born son of a disqualified son would obtain the share of his father in his grandfather's property. This also agrees with the limited right of representation recognized in Hindu Law.

It must, however, be pointed out here that under the Bengal Law such an estate in fee simple with a condition subsequent, on the happening of which the estate shifts, is unknown. There could be no case of adoption where the adopted son would divest the estate in the possession of the male holder. For instance, in a case similar to that reported in 3 I. A., p. 164 the widow of A would succeed to the estate and not the brother. It may therefore be said that Jimutavahana is not likely to have created this new kind of estate. But it must also be remembered that the Dayabagha is only an innovation of, or a development from, the Mitakshara; that the theory of property propounded by Jimutavahana is not carried out to its logical results in all directions. As a matter of fact Jimutavahana makes use of his theory of property for the purpose of giving the father of the family a right to alienate the ancestral property (even this is doubtful), and for the purpose of preventing the sons from claiming partition during the lifetime of the father, and to prevent survivorship among the members of the family. Just as in a Mitakshara family, under the Bengal School of Law the father is bound to provide for the maintenance of the daughters and sons and for the marriage expenses of the daughters. Alienations by the father of the whole of the family property without reserving a portion for the maintenance of the members have been held to be invalid. And, lastly, if the father chooses to divide the family property among his sons, he cannot give the sons unequal shares; while if he were dividing his self-acquired property he could do so. There are, therefore, clear indications that, though Jimutavahana treated the family property in the hands of the father as the father's absolute property for certain purposes, it was still family property for other purposes, and the incidents of a joint Hindu family under the older school were recognized. The rules relating to exclusion were propounded at a time when probably individual property was unknown and the

joint family was the only proprieter. The author of the Dayabagha simply adopts the rules of the older writers and the rights of sons born to disqualified sons after the death of the grandfather seem to be the same as those assigned in the Mitakshara.

One more point only need be noticed in this connection. We find in the Dayabhaga no provision made for the re-vesting of his share in a disqualified person after the disqualification ceases, by means of medicaments, penance or otherwise; while the Mitakshara contains a definite rule on this point. If the omission by Jimutavahna meant that even after the disqualification ceases, he is unable to resume his share, the conclusion would be irresistible that his subsequent-born qualified son would not divest the estate vested in an intermediate owner. But we think that such was not the intention of the author, but that on the removal of the disability, the right to a share revives as in the case of an after-born son as stated in the Mitakshara. This, however, will be discussed later on.

We are, therefore, of opinion that *Mr. Justice Norman's* interpretation of the Dayabagha texts is correct and is certainly more equitable than the interpretation of the Judges in appeal.

(*d*) There could be no doubt that in a Mitakshara joint family if at the time of partition, a son is born to the disqualified son, he would be entitled to the share of his father. For no member of a joint family has, as such, any vested right in any particular share of the family property. He has only a right to enforce a partition, and the shares will depend on the state of the family at the time of partition. If at that time the disqualified member is unable to take his share, his son then living, would obtain his share under the express texts just as a son adopted by the widow of a deceased member of a joint family would get. In fact partition among members of a joint family corresponds for this purpose to the death of the father of the family under the Bengal Law.

(*e*) This class of cases has a close analogy to the class considered under division (*c*), *viz.*, the right of a qualified son of a disqualified father to a share in the grandfather's property under the Dayabagha Law. For after partition among members of the joint family the coparcenary ceases and the shares of the branches of the family could not increase or diminish by births or deaths in

the other branches. But there are exceptions to this rule. For example if A, B and C are brothers and members of an undivided family and if A dies leaving a widow giving her a power of adoption which she does not exercise till after a partition between B and C, the adopted son when he comes into existence will be entitled to claim A's share from B and C. Again if A has gone abroad and if under the impression he is dead B and C divide the property between themselves, on the return of A he would be entitled to his share. No doubt this is not a properly analogous case, but it illustrates the position that property once vested may under certain circumstances be divested. The analogy of an after-born son is also suggested in the Mitakshara. Again it is not correct to say that on a partition the joint family comes to an end for all purposes; for, the female members of the family are entitled to maintenance and for their marriage expenses from the family funds; and also such of the male members as are unable to take a share owing to their disabilities. In discussing the position of the son of a disqualified member under the Dayabagha we have given our reasons for thinking that even under that school the son would be entitled to his father's share. *A fortiori* under the Mitakshara he would be so entitled. Under the Mitakshara, divesting an estate from a male owner obtains in the case of adoption (L. R. 3 I. A., p. 164) while such a thing could not happen in any case under Dayabhaga Law. Further the Mitakshara provides on the cessation of the disability the disqualified member gets his share, apparently divesting it from the intermediate possessor. Accordingly in the case of *Krishna* v. *Sami*, I. L. R., 9 M., p. 64, the Full Bench of the Madras High Court held that the son of a deaf and dumb member is entitled to obtain his father's share from his cousin. The position of the family was as follows:

Sami.	Venkatasami.
Deaf and dumb son.	Krishna, 1st defendant.
Sami and Gopala, Plaintiffs.	Sons, 2nd and 3rd Defendant.

On the death of Sami the whole family property vested in the first defendant Krishna and his sons by survivorship. After this period, plaintiffs were born. At the time of such vesting there was

strictly no coparcenary of which they or their father were members, yet it was held that the family was to be treated as undivided coparcenary and that the plaintiffs were entitled to their half share. The analogy of an adopted and of an after-born son was strongly relied on in support of the ruling. An exactly similar case arose in Bombay, *Bapuji Lakshman* v. *Pandurang*, I. L. R., 6 B., 616, where on the authority of the Calcutta case, *Kalidas Das* v. *Krishan Chandra*, 2 B. L. R., F. B., 103, a decision adverse to the claim of the son of the disqualified member was given; but for reasons already given we prefer the decision of the Madras High Court.

The effect of the insane person being cured of his insanity and the effect of dispositions made by the intervening heir during the disability of the nearest heir will be considered later.

K. SRINIVASA AIYANGAR.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER I.

Partition of Heritage.

1. In this connection, Manu says: "Thus has been declared to you the law for the conduct of man and wife abounding in affection. Learn now the law of partition of heritage."(1) Narada says: "Where division is made by the sons of their father's wealth, that topic of litigation is called by the wise partition of heritage."(2) *Commentary*—'Where' means 'in which topic of litigation.' '*Prakalpyate*' means 'made.'

2. Manu says: "After the father and the mother, let the brothers being assembled divide their father's wealth equally; for while their parents live, they have no power over it."(3) *Commentary*—The word '*samam*' means 'equally'; the meaning is that in such a case the doctrine of reserving a twentieth share, etc., does not apply. If it be contended that Manu lays down this doctrine of reserving a twentieth share in connection with partition between brothers after their father's decease and that therefore the division cannot be equal, it is replied that that text applies to cases of eldest

(1) Manu, chap. IX, 103. (2) Narada, chap. XII, 1.
(3) Manu, chap. IX, 104.

sons possessed of good qualities, etc. But Udayakara in his commentary upon this text observes that the word 'equally' is intended to refer to the wealth left after the deduction of the twentieth share, etc., is made. Halāyudha and Pārijāta read '*Saha*' (together) in the place of *Samam* (equally) and Pārijāta in his commentary says that '*Saha*' means 'mutually.' The word '*Pitrika*' is an *Ekasesha* compound formed by adding the *Taddhita* suffix. Halayudha says that the word '*Pitrika*' includes the mother's wealth also. Some say that even if the word '*Pitrika*' were an *Upadana*, it must be understood as including the wealth of the paternal grandfather and others as the text which begins with "In the property of the paternal grandfather" speaks of partition of such property also. Both these must be held to be included in the term.

3. Devala says: "Let the sons divide the father's wealth after his decease; for they have no ownership while he is alive and free from defect."(1) *Commentary*—'Free from defect' means 'free from such defect as liability to excommunication, etc.'

4. Narada says: 'When the father has gone to heaven, let the sons divide the father's wealth. Let the daughters divide the wealth of their mother, and in default of daughters, their issue."(2) *Commentary*—Let the daughters divide their mother's wealth; in the absence of daughters, let their issue, *i.e.*, the issue of the daughters divide. This is the meaning. As the portion of the text 'When the father has gone to heaven' indicates partition only among sons, the use of the word '*putra*' (son) is for the purpose of the inclusion of the *kshetraja* and other sons also. It therefore follows that so long as a son of any of the twelve kinds is alive, none else shall take the wealth. The expression 'of the father' is used for the purpose of indicating that there should not be a division among brothers of the gains of learning, etc., acquired by one of them. The word '*thad*' in the original must reasonably be taken to stand for 'daughter' because of proximity. Lakshmidharesvara also is to the same effect; but Prakāsa and Pārijāta hold that the word in the original '*thadanvaya*' means 'the issue of the daughters *i.e.*, the son, the son's son, etc.'

(1) Cole. Dig., Vol. II, 196, V. (2) Narada, chap. XIII, 2,

5. Sankha and Likhita say : " Let sons divide the wealth after their (father's death). Sons cannot divide the wealth while the father is alive, although they have subsequently acquired it. They have no power to do so. They are not their own masters in respect of wealth and religious duties while their father is free from defect."(1) *Commentary*—The expression 'subsequently acquired' means 'acquired by the sons independently of their father, by their learning, ability, etc., and by common exertion.'

6. Manu says: "The eldest son alone shall take the whole patrimony and the rest shall live in dependence upon him as on their father. A man becomes a father by the mere fact of the birth of his eldest son. His obligation in respect to the manes is discharged. The eldest son therefore deserves to take the whole wealth. He on whom the father shifts his obligation and by whom the father attains immortality is alone the son begotten of virtue. The rest (of the sons) are known to be born of desire. The eldest should protect his younger brothers as the father would do his sons and the younger brothers should, according to law, behave towards their eldest brother as sons should behave (towards their father). The eldest son it is by whom the line prospers or is ruined. The eldest son is most respected in the world and the eldest son is not treated with contempt by good men. The eldest son whose character is most honourable should be regarded like the mother and the father; but even he whose character is not most honourable should be respected like a relative. The eldest should not withhold from the youngers their shares (in the father's wealth)."(2) *Commentary.*—The text 'the eldest alone shall take, etc.,' means that the eldest son possessed of all qualities of the eldest son is as independent as the father in respect of partible property. The expression 'shall live in dependence on him' means 'shall follow his pursuit.' The expression 'becomes a father' means 'has obeyed the injunctions of the sastras enjoining him to procreate issue.' The expression 'by the mere fact, etc.,' shows that *samskāras* are immaterial. 'His obligation is discharged' means 'that he is released from one of the three obligations indicated by the *Sruti* which says that every man is born with three obligations.' The word '*Sannayati*' means 'unites,' '*Anantyam*' means 'happi-

(1) Cole. Dig., Vol. II, 199, VII. (2) Manu chap. IX, 105—110,

ness without end.' '*Asnute*' means 'obtains being freed from obligation.' The text 'the rest are born of desire' is an exaggeration. (The eldest son) should treat (the rest) like a father, *i.e.*, should not cheat them. The younger brothers should behave like sons, *i.e.*, should bear no grudge towards him. The eldest son makes the family prosper by good actions and protecting his younger brothers. The text 'Or is ruined,' suggests such a possibility. The duty of the eldest son is to support and protect his younger brothers, etc. He must be treated like a relative, *i.e.*, must be respected by such acts as rising on his arrival, prostrating before him, etc., and honoured as the maternal uncle, etc., not treated with contempt. '*Yautaka*' means 'wealth partitioned and set apart.' The root '*yu*' means 'to mix.' Halayudha, however, interprets '*Yautaka*' as 'ornaments of the wife, etc.'

7. Narada says: "Let the eldest brother of his own free will support the rest like a father, or let a younger brother who is capable do so. The prosperity of the family depends upon ability (of management)."(1)

8. Sankha and Likhita say: "Willingly let them live together; United, they may thrive."(2) The meaning is that resting upon mutual support, they will certainly become prosperous.

9. Manu says: "Let (the brothers) live thus in union or separately in view to the performance of religious duties. By separation, religious duties increase. So is separate living lawful."(3) *Commentary*—As none can have an independent power of disposition over joint wealth, and as, therefore, there can be no performance of sacrifices, etc., which requires separate and exclusive property for their performance, partition whose consequence is the acquisition of absolute power over property is said to be legitimate. To live separately in view to perform religious duties is only optional. It does not mean that living together without partition is unlawful like eating flesh. By partition religious duties like *Jyotishthoma* sacrifice increase.

10. Brihaspati says: "Where brothers live in commensality the worship of the manes, deities and Brahmins is one (need be per-

(1) Narada, chap. XIII, 5. (2) Cole Dig., Vol. II, 804, XIX,
(3) Manu, chap. IX, 111.

formed by one for the benefit of all); but where they are divided, the same has to be performed in the house of every one of them."(1) 'In commensality' means 'without division.'

11. Harita says: "While the father lives, the sons have no independent power in regard to receipt, disbursement and amercement of wealth. But if he be prodigal, absent, abroad or afflicted with disease, let the eldest son look to the affairs (of the family)."(2) *Commentary*—'Receipt' means 'using the joint wealth independently of the father.' Pārijata says that the word means 'acquisition of wealth.' The word *'visarga'* means 'giving away.' *'Akshêpa'* means 'recovering money from the debtor.' The word '*Kāmadāne*' means 'giving away wealth according to whims.' Prakasakāra reads '*Kāmamdine*' for '*Kāmadāne*' and says that '*Kamam*' indicates the permission granted by the father near at hand and that the word '*dine*' means 'out of his mind.'

12. Sankha and Likhita say: "Should the father be incapable, let the eldest (son) manage the affairs of the family or with his consent, his younger brother who knows the business. There can be no partition while the father does not wish it. If he be old, deranged in mind or afflicted with chronic disease, the eldest (son) alone should manage the family estate and protect the rest; for it is well-known that (the prosperity of a) family depends upon wealth. Men whose father is alive have no independence; likewise while their mother is alive."(3) *Commentary*—'*Anantara*' means 'subsequently born. 'With his consent' means 'with the consent of the eldest son.' 'Deranged in mind' means 'out of his mind owing to disease proceeding from air, etc.' The management of the family depends on wealth. 'Have no independent power' means 'are incapable of making gifts', etc. The meaning is that so long as a virtuous mother is alive, the sons have no independent power.

Here ends the Chapter of Vivadaratnakara on Dayavibhaga.

(1) Brihaspati, chap. XXV, 6. (2) Cole. Dig., Vol. II, 199, VIII.
(3) Cole. Dig., Vol. II, 203, XVII.

CHAPTER II.

Next partition among sons whose father is alive.

13. On this point, Manu and Vishnu say : " Where the father recovers ancestral property given up as irrecoverable, he need not divide such property against his wish with his sons, being self-acquired."(1) *Commentary*—' Ancestral' means 'descended from father, etc.' ' Irrecoverable ' means ' which the father was not able to recover.' He need not divide such property, if unwilling, with his son, because it is self-acquired.

14. Yajnavalkya says : " In land acquired by the grandfather, in corody or chattel, the ownership of both father and son shall be the same."(2) *Commentary*—*Nibandha* means that which is fixed, *i.e.*, wealth obtainable from mines. ' Ownership being the same' means that there shall be no greater share allowed to the father and no gift (of the property) at the father's choice.

15. Vyasa says : " In house and land descended from ancestors the father and the son take equal shares. Sons are not entitled to partition in the father's property while the father is unwilling."(3)

16. Brihaspati says : " In property acquired by the paternal grandfather, moveable and immoveable alike, the right of the father and the son is well-known to be equal. In the paternal grandfather's property lost and subsequently recovered by the father with his own abilities and in property acquired by the father by his learning, valour, etc., the ownership according to the *Smritis* is with the father. He may, as he pleases, make a gift of that wealth or allow a partition of it. In the absence of these, his sons are declared to be entitled to share it equally."(4) *Commentary*—The word ' lost ' means ' taken away by others.' The meaning is that property so lost which the paternal grandfather was not able to recover and which was subsequently recovered by the father by his own exertions and property acquired by learning, valour, etc., the father may dispose of, etc. On the right of the sons to make a partition, Narada says : " (Let the sons divide) after the mother has ceased to menstruate

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(1) Manu, chap. IX, 209.
(2) Yajnavalkya, II, 121.
(3) Cole. Dig., Vol. II, 258, XCIV.
(4) Brihaspati, chap. XXV, 8, 12 & 13.

and after the sisters have been married or after cohabitation has ceased and when the father has lost all desire."(1) *Commentary*—The word '*Prattha*' means 'married.' 'After cohabitation has ceased' means 'after the physical power to cohabit is gone.' 'When the father has lost all desire' means 'when the father has given up worldly desires.' For 'after cohabitation has ceased,' Prakasa has two alternative readings, namely, 'after the wish to cohabit is gone' and 'after cohabitation has become impossible;' but these different readings as interpreted in the commentary do not in the result conflict with this reading. Halāyudha reads 'turned away from cohabitation'; but even according to that, the drift is the same.

17. Brihaspati says: "Partition among brothers after the death of their parents has been laid down. But partition may take place even while the parents are alive, when the mother has ceased to menstruate."(2)

18. Goutama says: "Let the sons divide the wealth after their father's death or when their mother has ceased to menstruate and their living father is willing."(3)

19. Sankha and Likhita say: "Or partition may take place while their father is alive, with his consent and openly or secretly according to law."(4) *Commentary*—'Consent' means 'the father's consent.' 'Openly' means 'in the presence of umpires.' 'Secretly' means 'without umpires.'

20. Baudhāyana says: "Partition (shall take place) with the father's consent."(5)

21. Next Hārita says: "A father may make a partition during his lifetime, go to the forest or enter into the order suitable for an aged man; or he may divide a small part of his property (among his sons) and remain (in his house) keeping the greater part of it. Should he lose his wealth, he may take the son's share back from them. He must also give a portion to his indigent sons."(6) *Commentary*—'Go to the forest' means 'enter into another order.' Pra-

(1) Narada, chap. XIII, 3.
(2) Brihaspati, chap. XXV, 1.
(3) Goutama, chap. XXVIII, 1—3.
(4) Cole. Dig., Vol. II, 205, XXI.
(5) Baudhayana, II, 2, 3 & 8.
(6) Cole. Dig., Vol. II, 205, XXIII.

kasakara says that 'entering into an order suitable for an aged man' means 'to renounce all *karma* and live upon the wealth of the son.' Halāyudha and Pārijāta, however, say that the order suitable for an aged man is the fourth order. According to them, 'going to the forest' means 'entering into the order of the *Vānaprastha*.' The particle '*vā*' really indicates disinclination. That word shows that there is a mode of life other than going to the forest or entering into the order suitable for an aged man. 'Divide a small portion, etc.,' must be understood to apply to persons who wish to remain in the householder's order even after becoming true sanyasins. The word '*Upadasyêt*' means 'grow poor.'

22. On this point, Narada says: "Or the father who has become old may of his own free will make a division between his sons, either giving to the eldest son the largest share or in any other mode, according to his wish."(1) *Commentary.*—The word '*va*' denotes an alternative. The meaning is that the father or the sons may divide. 'Become old' means 'rendered incapable more than previously.' Therefore alone Goutama in the text beginning with 'the son born after partition,' etc., says that partition should be made where a son is born after partition. The word '*jyeshta*' means 'most excellent.' 'According to his wish' means 'in equal or unequal shares as he pleases.'

23. Vishnu says: "If the father should make a partition among his sons, he has absolute power over wealth acquired by himself."(2) *Commentary*—This applies to property acquired without the aid of the father's wealth.

24. Yajnavalkya says: "If the father should make a partition, let him separate his sons at his pleasure. He may give the eldest son the best share or let all the sons share equally."(3) *Commentary*—This text also refers to self-acquired property of the father; for in property acquired by ancestors, the father and the son are said to be entitled to share equally.

25. In this connection, the same author lays down a special provision where the partition is equal. "If he make the shares equal, his wives to whom no separate property has been given by the

(1) Narada, chap. XIII, 4. (2) Vishnu, chap. XVII, 1.
(3) Yajnavalkya, II, 114.

husband or the father-in-law must be rendered partakers of like portions."(1) *Commentary*—If the father gives his sons equal shares, then his wives also should be made to get equal shares. Therefore, where the shares of the sons are unequal, it must be understood that the wives also take unequal shares. The wives are not the wives of the sons, the term 'wife' being correlated to the person making the partition, *i.e.*, the father. The meaning of the latter part is that where any of the wives have not been given any property by the husband or the father-in-law, she or they must be made equally rich with the rest. Halāyudha holds that this applies even in the case of wives having no issue. Prakāsa says that where any *stridhanam* has been given, she takes only a half (of what she would otherwise get).

26. Narada says: "Let the father making a partition reserve two shares for himself."(2) *Commentary*—'*Pratipadyeta*' means 'obtain.' '*Vibhajan*' means 'making a partition.'

27. Brihaspati says: "The father may take two shares for himself at a partition made during his lifetime."(3) *Commentary*—This text in the light of the text of Sankha applies where the father has an only son. Sankha and Likhita on the rights of the father say: "If the father has an only son, he may take two shares for himself and a larger share of bipeds and quadrupeds."(4) *Commentary*—It means that the father may take a larger number of these and two shares also. Accordingly it is said: "The bullock should be given to the eldest, and the house, except where the father resides, to the youngest."(5) *Commentary*—The following is the drift: Where the father has many sons and the eldest and the youngest are possessed of good qualities, the bullock should be given to the eldest and the house to the youngest *even against the wishes of the father:* for otherwise the rule would serve no purpose. As regards the text of Yājnavalkya, which says:—"Or let all the sons take equal shares," Halāyudha observes that that does not conflict with the text under consideration, that text being intended to lay down simply that where all the sons are equally worthy, they may at the

(1) Yajnavalkya, II, 115. (2) Narada chap. XIII, 12.
(3) Brihaspati, chap. XXV, 5. (4) Cole. Dig., Vol. II, 216, X LIV.
(5) Cole. Dig., Vol. II, 216, X LIII.

father's option be given equal or unequal shares at the partition. Pārijāta says that an only son is the eldest son. Bhashyakara omits the word '*putra*' (son) and reads 'if the father be alone' which he explains as meaning that even if he has no wife living the father gets two shares, and if his wife is living he should gladden her by giving her another share. Of bipeds and quadrupeds let him take one more than his two shares. This rule of inequality applies where the eldest and the youngest are possessed of good qualities and it has effect even though the father be unwilling, for otherwise the rule will become inoperative. The equality of shares spoken of by Yājnavalkya applies where all the sons are possessed of good qualities. In the absence of any excellence, the sons share equally or unequally according to the father's choice. The word '*anyatra*' means 'excluding the house where the father resides.'

28. Baudhayana says: "Let him make a partition among his sons; the shares of all shall be equal, it being without distinction laid down in the *Srutis*. Let the eldest take one most excellent chattel, as the *Srutis* declare 'It is necessary to gratify the eldest son with wealth.' He shall take one out of every ten, and all shall share the rest equally."(1) *Commentary*—Of all the things available for partition the eldest son shall take one most excellent. The author supports this view by quoting the *Sruti* 'it is necessary, etc.' The word '*dhana*' is defined as 'deduction.' '*Niravasayanti*' means 'separate him from the other sons.' Another alternative is that the eldest may take one out of every ten cows, etc., of equal class even despite the father's wish. This alternative depends upon the degree of excellence which the eldest son possesses.

29. Apastamba says: "Having gratified the eldest son with one chattel, let the father in his lifetime distribute the wealth among his sons in equal shares, excluding the impotent, the mad and the degraded."(2) *Commentary*—This refers to the father who though alive has become incapable of procreating; one chattel, means one most excellent horse, etc. The impotent, etc., are intended to include all who are not entitled to inherit.

30. Here Manu says: "Where undivided brothers have combined their efforts, the father shall under no circumstances

(1) Baudhayana, II, 2, 3-3-1. (2) Apastamba, II, 6, 13-13 and II, 6, 14-1.

make an unequal partition among them."[1] *Commentary*—The 'effort' here meant is the endeavour conducive to the acquisition of wealth.

31. Narada, Brihaspati and Yajnavalkya say: "Sons to whom equal, less or greater shares have been allotted by the father shall respect such a distribution; otherwise they shall be chastised."[2]

32. Narada says: "For such as have been separated by their father with equal, greater or less allotments of wealth, such distribution shall be the legal one; for the father is the lord of all."[3] *Commentary*—There is no conflict between the previous text and this, as that forbids unequal partition among brothers of property acquired by them by their joint exertions and this allows of unequal partition of the ancestral property.

Here ends the chapter of Vivadaratnakara on Partition among sons during the father's lifetime.

CHAPTER III.

Partition among sons whose father is dead.

33. On this subject Manu says: "The portion deducted for the eldest is the twentieth part of the whole wealth, together with the best of all chattels; for the middlemost, half of that; and for the youngest, a quarter of that. The eldest and the youngest shall take as indicated and others than the eldest and the youngest shall take the best of all items of wealth and shall take any one thing superior in kind and the best of every ten."[4] *Commentary*—This deduction obtains in the case of the eldest possessed of good qualities, etc. The following is the settled rule on this point:— Where there are many sons of the same mother all possessed of good qualities, but less and less good according to their order, then a twentieth share of the common wealth should be deducted in favour of the eldest and he should also be given the best of all the chattels. Half of that, *i.e.*, a fortieth share (should be deducted) in favour of the middlemost, who should also be given a middling chattel. Similarly, a fourth, *i.e.*, one-eightieth of the

(1) Manu, chap. IX, 205.
(2) Brihaspati, chap. XXV, 4.
(3) Narada, chap. XIII, 45.
(4) Manu, chap. IX, 112-114.

whole wealth should be deducted in favour of the youngest, and he should be given also the least precious of the chattels. Where, however, the eldest and the youngest alone are possessed of good qualities, they should be allowed a deduction as laid down and the brothers intermediate who are not possessed of good qualities should get (only) the middling chattel and the deduction allowed in the case of the middlemost, *i.e.*, a fortieth share, should be equally divided and distributed. Where there are many between the eldest and the youngest eminently possessed of good qualities, the deduction of a fortieth share should be allowed and given to every one of them. If the eldest is eminently possessed of good qualities and the rest have none at all, then the most excellent of all the chattels, that which is superior in kind to the rest, such as *padmaraga* (a ruby) and the best one out of every ten of all cows, buffaloes, etc., shall be taken by the eldest.

34. Gautama thus lays down a distinction to be observed where the eldest is surpassingly good and the rest of middling quality. "To the eldest, a twentieth share, a pair, a cart drawn by animals having teeth in both jaws and an excellent bull; cattle, old, hornless, one-eyed and tailless, to the middlemost; if there be many of them, sheep, grain, iron, a house, a cart with bullocks and one of every class of quadrupeds to the youngest; all the rest should be divided equally"(1) *Commentary*—A twentieth share means a twentieth of the whole paternal wealth. 'A pair' means 'a pair of cows.' 'Animals having teeth in both jaws' are horses, asses, etc., a cart drawn by two animals of the same class from among these animals and an excellent bullock, *i.e.*, one capable of impregnating, these are the deductions, where available, in favour of the eldest. '*Khora*' means 'wool.' '*Kuta*' means 'having no horns.' '*Vanda*' means 'having no tail.' This is the ox well-known as '*Vende.*' This is the deduction in favour of the middlemost. The same rule applies where there are many of them. '*Avih*' means 'a sheep.' '*Dhanya*' means 'grain.' '*Ayas*' means 'iron.' As these are mentioned together, something of each must be given accordingly. '*Anaha*' means 'cart,' '*Yuktam*' means 'to which bullocks are yoked.' One of every class of quadrupeds, such as cows, etc. This is the deduction in favour of the youngest. Similarly

(1) Gautama, chap. XXVIII, 85.

where in the matter of deduction, a greater and a less are declared, the determination depends on the extent to which the brothers are possessed of good qualities. In the world, however, the eldest alone is respected and without allowing the deduction in favour of the middlemost and the youngest brothers, a twentieth share is deducted in favour of the eldest alone as we see.

35. Hārita says: "Where a herd of cattle is partitioned, one excellent bullock should be given to the eldest as also the idol in the house. If the rest leave and make (houses) for themselves, the best should be given to the eldest and the rest shall take according to their order."(1) *Commentary*—'*Ekadhana*' means 'one most excellent chattel.' '*Devata*' means 'image of Vishnu, etc., The house is the ancestral house. '*Kuryuh*' means 'build other houses, 'other houses' being understood. Where the other sons have to leave the ancestral house and build other houses, then the best house should go to the eldest. '*Ānupūrvyam*' means 'order of age.' Therefore, the middlemost gets a middling house and the youngest one smaller than that. Harihara, however, interprets '*Devatāgriha*' to mean 'the dome set apart for the worship of *Durga* and other deities' and says that that should be given to the eldest while other sons should build one for themselves.

36. Apastamba says: "In some countries, gold, black cows, black produce of the land and the vessels of the father are all given to the eldest."(2) *Commentary*—'Black produce of the earth,' *i.e.*, gingely seeds, black gram, etc. '*Paribhanda*' means 'vessels used for purposes of eating, etc.'

37. Baudhayana says: "In the absence of the father and in the four castes, cows, horses, goats and sheep, in the order of their mention are the share of the eldest."(3) *Commentary*—This rule applies where the eldest brother excels others in good qualities.

38. Devala says: "The middling share should be given to sons who are equal. To the eldest who keeps in the path of virtue, a tenth share should be given."(4) *Commentary*—'The middling share' means 'the middling deduction, *i.e.*, one-twentieth share.' Halāyudha and Pārijāta say that this rule applies where the eldest

(1) Cole. Dig., Vol. II, 218, X LVI.
(2) Apasamba, II, 6, 14-7.
(3) Baudhayana, II, 2, 3-9.
(4) Cole. Dig., Vol. II, 215, X. I.

is learned in the Vedas and where the others are not possessed of good qualities. Others hold that, according to the first half of the text where the eldest performs *agnihotra* and is learned in the Vedas and the other brothers are possessed of good qualities, the eldest should be given a tenth share and the other sons should each get the middling share, *i.e.*, a twentieth share. Where the eldest performs *agnihotra* and is learned in the Vedas and the other brothers are not possessed of good qualities, then the eldest should get a tenth share, and every one of the brothers having no good qualities should, as previously stated, get a separate allotment of a fortieth share. This is the meaning of the second hemistich.

Here ends the chapter of Vivadaratnakara on Partition among sons after the father's death.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Mathura Das *v.* **Bhikhan Mal,** I. L. R., 19 A., 16. There is no rule of Hindu Law that a gift to a female should only carry with it the limited nature of a widow's estate by inheritance. (*Kollany* v. *Luchmee*, 24 W. R., 395; *Pubitra* v. *Damoodur*, 24 W. R., 397.) But as pointed out by the Privy Council in *Moulvie Mahomed Shumsool Hooda* v. *Shewukram*, 2 I. A., 7, a gift or testamentary disposition by a Hindu in favour of a woman should be taken with the surrounding circumstances and the words of disposition should be so construed as to give effect to the intention which a Hindu is ordinarily supposed to entertain with reference to the estate conferred on a woman. Gifts, therefore, by Hindus in favour of their wives without special words creating an absolute estate have generally been construed to confer only a limited estate. The disposition in the present case, however, was in favour of the son's widow; and the disposition in favour of the adopted son and the son's widow together would rather seem to us to indicate that there was no difference intended between the nature of the estate conferred upon the son and that of the estate conferred upon the son's widow. Moreover, we do not think the learned Judges were justified in referring to the subsequent conduct of the son's widow in not contesting a certain decision as evidence of the nature of the estate intended to be conferred upon her by the terms of the will. We are aware of cases in which the Privy Council have construed the disposition in favour of a woman and a man

as giving her as large an estate as the male took. See *Narpat Singh* v. *Mahomed Ali*, I. L. R., 11 C., 1, and *Jogeswar Narain Deo* v. *Ram Chandra Dutt, Ib.* 23 C., 670. We are not, however, prepared to say that the decision is erroneous in regard to the first two villages. The words of disposition were simply that the son's widow shall be regarded as owner after the testator's death. These words would hardly seem to us sufficient to create a larger estate than that of a Hindu widow.

Tapesri Lal *v.* **Deoki Nandan Rai,** I. L. R., 19 A., 22. We are at one with the learned Judges who decided in this case that the absence of a certificate by the officer holding the sale under S. 293, does not vitiate the proceedings of the Court ordering the realization of the deficiency from the defaulter. We cannot regard such a certificate as a condition precedent to the proceedings contemplated by the second part of the section. But we doubt whether a separate suit will lie at the instance of the defaulter for the recovery of the money realized from him under S. 293. Section 30 of the Code has, of course, nothing to do with the question. This is the case of a miscellaneous proceeding followed by a suit; and S. 30 has no application to it. But we apprehend that it is a judicial order and not a purely ministerial one which directs the payment of the defficiency, and the recovery of money under judicial process cannot furnish a cause of action for a suit by the defaulter.

Lachman Das *v.* **Khunnu Lal,** I. L. R., 19 A., 26. The point involved in this is one of very considerable importance. When ancestral property has descended from the grandfather to the grandson, can a debt secured upon the property by the grandfather be recovered with interest from the assets in the hands of the grandson. The Judges of the Allahabad High Court, in Full Bench, answer the question in the affirmative. The principal money secured and the interest were, no doubt, recoverable from the assets in the hands of the son. There was thus a valid charge upon the property to the extent of the whole claim so long as the property was in the hands of the grandfather and after him in those of his son. A difficulty arises as to how the debt shall be extinguished as regards the interest the moment the property passes to the grandson. It might always be contended that so far as the grandson's share of the property is concerned, the grandfather has no business to charge it with interest upon the debt. But as regards the shares of the other people, namely, those of the grandfather and the father, they come to the grandson burdened with the charge. It may be held that the right of the grandfather to burden the grandson also for a debt not illegal or immoral extends only to the burdening of his share with the principal of a debt borrowed. We are unable to see that the decisions of the Privy Council

as regards the son's liability to pay the father's debts involved any principle rendering the assets in the hands of the grandson liable also for the interest of the grandfather's debt; nor does the Transfer of Property Act appear to us to affect the question. We are, therefore, inclined to think that if there is any authority in the Sanskrit texts limiting the liability of the grandson only to the principal of the grandfather's debt, effect could well be given to it by freeing his share of the ancestral estate at the time of the creation of the debt from liability to interest. There seems, however, to be considerable force in the argument of *Knox*, J., that the rule as to freedom from liability to interest has no application to secured debts. If this be the case, the inconveniences in the drawing up of a mortgage decree referred to by the majority of the judges have no place. The texts cited appear to us to warrant the rule that in the case of unsecured debts incurred by the grandfather, the grandson is not liable for the interest; for he takes the property, or rather the share of the grandfather by survivorship, and the rights so taken are only subject to the limitation created by the Hindu Law.

Mathura Das *v.* Raja Narindar Bahadur, I.L.R., 11 A., 39. This decision may well be regarded as setting at rest a controversy started by the Allahabad High Court about ten years ago as to *post diem* interest. The conflict of authority in the decisions of the Madras High Court and also in the decisions of the Calcutta High Court may well be deemed to have been set at rest. We must, however, confess that few decisions of the Privy Council have used language more unsatisfactory than the judgment in the present case. We are extremely unwilling to use any language calculated to impair the respect due to the august tribunal which is the final court of appeal for India and all the British Colonies. We are not told whether their Lordships depart from the principles laid down in *Cook* v. *Fowler*, L. R., 7. English and Irish Appeals 27. The reference they make to the covenant not to transfer till principal and interest be paid and to the provision for applying payments to the reduction of interest seems to suggest that the intention of the parties that interest will be continued to be paid *post diem* as gathered from the language of the instrument under consideration is confined to the particular language used and will not ordinarily be presumed to extend to other mortgage instruments where there is a covenant to pay the principal and interest by a certain date merely. However this may be, taking the contract as making no provision for *post diem* interest and assuming that damages are recoverable by way of interest, their Lordships ask with the appellants before them why

they should not recover six years' interest by way of damages. They observe that every day the principal debt remained unpaid, there was a breach of contract and that the bar of time applied only to breaches occurring six years before suit. If we are to understand this language in its ordinary signification, it comes to this that there is a continuing breach of contract every day the debt remains unpaid after the due date and S. 23 of the Limitation Act giving a fresh starting point from each subsequent breach would save the suit from being barred at any time. It seems somewhat extraordinary to be told that there is a breach of contract every day the principal remains unpaid.

Shah Abu Ilyas *v.* Ulfat Bibi, I. L. R., 19 A., 50. The difficulty felt by *Knox, J.*, in this case as regards the absence of any provision in S. 490 for making any enquiry as to the continuance of the status of husband and wife seems to be real; but it cannot be supposed that while the Magistrate is entitled to cancel the order on proof that husband and wife are living separately by mutual consent or that the wife is living in adultery, the Magistrate is precluded from stopping the allowance while the marriage tie itself has been severed. The strong consensus of authorities notwithstanding the absence of any clause in S. 490 or in S. 488, authorizing the discontinuance of the allowance, is sufficient proof of what should have been in the mind of the Legislature regarding the continuance of the marriage relation as a condition precedent to the continuance of the allowance.

A. B. Miller, Official Assignee of the Estate of Ramakishen Das *v.* Babu Madho Das, I. L. R., 19 A., 76. We are glad that the Privy Council has declared that an erroneous omission to object to the admission of testimony on the ground of irrelevancy does not make it available as a ground of judgment. Several judges of the Madras High Court have been acting on the view that a legal objection arising on proved or admitted facts not taken in the court of first instance cannot be raised for the first time in appeal. We have always been clear that such a rule was erroneous. Indeed the Courts in England and India had several times said so. The disinclination to consider knotty points which is a weakness of some judges is alone to account for the practice we have referred to. We hope that the reiteration by the Privy Council of the sound principle will be loyally followed. The decision does not of course mean that if secondary evidence was received without objection, it could be objected to in appeal on the ground that primary evidence should have been adduced.

Sadho Saran v. Hawal Pande, I. L. R., 19 A., 98. We have no doubt that the view of the Full Bench that S. 43 does not apply to execution proceedings is right. Indeed S. 647 A. would make it perfectly clear even if there was any doubt about it prior to its enactment. The decree for possession and for mesne profits is for two distinct reliefs either of which may be enforced without reference to the other. If there was any doubt upon the question, some prior decisions of the Allahabad High Court with reference to S. 373 would be answerable for it.

Muhammad Sirajul-Haq v. Imam Ud-din, I. L. R., 19 A., 104. A suit by certain persons to dismiss the defendants from trusteeship and appoint certain others instead and place them in possession, is not a suit for possession of property to be valued as such for purposes of court fee. Art. 17, cl. 6 of the second schedule of the Court Fees Act applies to the case. The decision in *Thakuri* v. *Bramha Narain*, I. L. R., 19 A., 60, is also to the same effect as the case under notice. But that the prayer of the plaintiffs to appoint certain persons other than the plaintiffs or such persons as the Court thinks fit does not affect the question. There is no doubt that the decision of the Madras High Court in *Srinivasa Ayyangar* v. *Srinivasaswami*, I. L. R., 16 M., 31, lays down that the plaintiff should pray for possession and not merely to remove the defendants' trustees. This too appears to us to be questionable. The suit for possession which is to be stamped *ad volorem* does not include one in which the plaintiff prays for possession being given to the trustees whom the Court may appoint.

Mutasaddi v. Mani Ram, I. L. R., 19 A., 112. Where part of a fine imposed is paid as compensation to the complainant in accordance with an order under S. 545, but the sentence is quashed in appeal or revision, there is no provision in the Code authorizing the realization of the money from the complainant. S. 547 does not appear to us to have any application. The Madras High Court appears to have been of this view in a case reported by Weir in p. 1143.

Vasudevan v. Sankaran, I. L. R., 20 M., 129. There has always been a mystery shrouding questions of Malabar Law which makes Judges fight shy of them. It has appeared to us somewhat difficult of explanation that an accepted principle of law when applied to a Malabar case assumes a form to the minds of Judges which renders it unrecognizable. The present case is an instance of an error which has been perpetuated for many years, only because it was supposed to be involved in the intricacies of Malabar Law. There was no explanation as to why the decree in a suit *by* a *karnavan* which went against him was binding

upon the *anandravans* in a subsequent suit by them upon the same cause of action, while a decree in a suit *against* the *karnavan* had not the same force. The Judges in Full Bench have rightly overruled the course of decisions holding that, notwithstanding the decree against the *karnavan*, the *anandravans* might sue to get rid of it.

Sankaran *v.* **Raman Kutti,** I. L. R., 20 M., 152. One of the points decided in this case was that from the decision of a single Judge of the High Court in an appeal from an order of remand there is no appeal under S. 15 of the Letters Patent. This is, no doubt, in accordance with the view of the Full Bench of the Allahabad High Court. But we have expressed our disagreement with this in a critical note on *Muhammad Naimullah* v. *Ihsanullah Khan* 2, M. L. J. 343. The same question in another case was referred to the Full Bench in Madras; it was argued and judgment was reserved for a period of more than six months; then it was simply disposed of by the Judges saying that it was unnecessary to consider it. The question then arose in this way. An order for security for costs was made by a single Judge in a regular appeal. An appeal under the Letters Patent was preferred against his order. In this appeal under the Letters Patent, the respondent raised the preliminary objection that there was no appeal under the Letters Patent by virtue of S. 591 of the Civil Procedure Code. The question, whether there was an appeal under the Letters Patent from the order of a single Judge directing security for costs, was referred to the Full Bench and on argument, judgment was reserved. In the meantime, the security ordered not having been furnished within the time specified, the regular appeal was dismissed. The Judges in Full Bench dismissed the appeal under the Letters Patent as the regular appeal out of which it arose had already been dismissed. Perhaps, we should correct the statement and say that two of the Judges of the Full Bench—The *Chief Justice* and *Benson*, J.—passed the order of dismissal, the other Judges having been informed that it was unnecessary for them to deliver their judgments. What a commentary upon the ways of the High Court!

Shankar Diyal *v.* **A. M. Venables,** I. L. R., 19 A., 121. The wording of S. 195 of the Criminal Procedure Code does undoubtedly give rise to the difficulties pointed out by *Edge*, C. J. To whom an appeal ordinarily lies is not always a question of easy solution. It looks somewhat anomalous that the District Court should be deemed to be the *forum* to which appeals ordinarily lie from the Assistant Collectors, and yet we cannot say that the decision is wrong. An amendment of the section appears to be clearly needed.

Janki v. Bhairon, I. L. R., 19 A., 133. It appears to us that considerable difficulties have been caused in the interpretation of wills by attending too much to the surrounding circumstances without confining ourselves to the language of the will itself. The nature of the estate that testators intend to grant to their devisees should be made manifest by the language they choose to employ and not by reference to the character and position of the devisee. We are aware that the Privy Council is responsible for this state of things. We think it is yet possible to make a stand and for the court to proceed upon clear and definite lines. The decision in the present case introduces a further difficulty as to whether the estate granted is a widow's limited estate of the absolute property of the devisee or her sridhanam property with a special course of devolution and limited rights of alienation. Instead of introducing the last alternative which only further complicates matters when there is no express language to warrant the same there is enough in the language to show that the estate is absolute.

Bhagvati Prasad v. Jamna Prasad, I. L. R., 19 A., 136. The assignee of a decree having executed it, and the decree having been reversed in appeal without the assignee having been made a party to the appeal, a question arose as regards restitution under S. 583. Civil Procedure Code. The learned Judges hold that there could be no restitution in execution as the assignee was no party to the appeal. We think there is considerable force in the argument leading to that conclusion.

Indo Mati v. Gaya Prasad, I. L. R., 19 A., 142. We cannot understand what difficulty there was in this case, and the Judges appear to us to have been unnecessarily complicating matters by referring to S. 372 of the Civil Procedure Code. The last clause of S. 244 appears to render the question perfectly clear, for, a question as to whether a person is the representative of a party for purposes of execution is a question under S. 244 and the order is a decree under S. 2.

Gobind Chunder Nundy v. Srigobind Chowdhry, I. L. R., 24 C., 330. We have discussed elsewhere 2 M. L. J., 2, the question as to whether an action for contribution for costs will lie and the application of the principle of *Merryweather* v. *Nixan* to such cases. The setting up of a fraudulent defence to an action is not in itself a piece of wrongdoing which is actionable, and the rule that there is no contribution between wrongdoers has in terms no application to such a case. If the principle were in itself sound, there would be no objection to extending

it by analogy to cases where several defendants have conspired to make a false defence. But the wisdom of the rule in the leading case has itself been questioned. See 1 Smith's Leading Cases, p. 383.

Kailash Chandra Chuckerbutty *v.* **Kashi Chandra Chuckerbutty,** I. L. R., 24 C., 339. In this case the daughters of a Hindu, succession being governed by the Dayabhaga Law, entered into an arrangement among themselves whereby the share of each was not to lapse to the others on the death of any of them, but it was to continue in the line of her heirs. The Court held that this arrangement was good so long as it did not affect the rights of reversionary heirs except by way of accelerating their succession. The decision is perfectly sound, and it seems to us to be equally applicable to cases governed by Mitakshara law. It is competent to the holders of limited estates to consent to the alienation of the whole of their interest in any portion of the property during the period for which their estate would last.

Srinath Roy *v.* **Gadadhur Das,** I. L. R., 24 C., 348. The point raised in this case appears to be a new one. We are not aware of any decision as to the meaning of S. 59 of the Transfer of Property Act where it speaks of equitable mortgages by deposit of title-deeds in certain towns. Does the section refer to transactions taking place in those towns, or to transactions, wherever they may take place, which relate to property situated within those towns. These are the only two possible interpretations of the section. But we have no doubt that the obvious meaning of the wording is in favour of the former view. A third view may perhaps be suggested that the property should be situated and the transactions should also take place within the presidency towns. There are not enough words in the section for this.

Bhiram Ali Shaik Shikdar *v.* **Gopi Kanth Shaha,** I. L. R., 24 C., 355. The first question dealt with in this case is one of some importance; and, although the decision of that question is correct, we are not sure that the interpretation placed upon S. 244 is sound. The learned Judges observe that S. 244 bars a suit brought for the determination of certain questions, but it does not bar a trial of any issue involved in those questions if the issue is raised at the instance of a defendant in a suit brought against him, and they proceed to distinguish S. 244 from S. 13 which bars the trial of any issue which might have been raised in the trial of a former suit. We are unable to accept this opinion as altogether satisfactory. There does not seem to be much warrant for placing this restricted interpretation upon S. 244, which precludes a separate suit at the instance of either party for the trial of any question (which certainly

includes issue) between the parties relating to the execution, &c., of the decree. The suit in this case was by the purchaser of the property for possession; and any question between such purchaser and the judgment-debtor is not a question relating to execution as pointed out by us in 1 M. L. J.

Latifunnessa *v.* **Dhan Kunwar**, I. L. R., 24 C., 382. We confess to share in the doubt expressed by *Ameer Ali*, J., as to the correctness of the decision in this case. The amount of the bond is expressed to be repayable in a certain month of a certain year, and stated to be six years from the date of the bond. We think that the specific date mentioned in the document, and not the date arrived at by calculating the period of six years from the date of the bond should be regarded as the date of the starting point.

Muhammad Abdul Majid *v.* **Muhammad Abdul Aziz**, I. L. R., 19 A., 155. The Privy Council in this case lay down the broad proposition that where a case raises several questions, it is competent to the Court to try some of them, reserving the determination of the others to a later stage. S. 212 of the Code expressly authorizes this in the case of a suit for possession of property and mesne profits, the question of mense profits being determinable at a later stage. S. 146 authorizes the Court to post a case for disposal upon the issues of law raised in the case, the issues of fact being reserved for determination at a later stage. The rule laid down by the Privy Council is general and beneficial.

Umardaraz Ali Khan *v.* **Wilayat Ali Khan**, I. L. R., 19 A., 165. A suit by some of the heirs of a Mohamadan against other heirs is not governed by Art. 123. That Article refers as pointed out by us in 2 M. L. J. and by the Madras High Court in *Sithamma* v. *Narayana*, I. L. R., 12 M., 487, to an action against an executor or administrator distributing the estate of the deceased. Nor does Art. 62 apply, for it is not a case of money received to the plaintiff's use ; for the defendant, being himself one of the heirs, is entitled to a share. Art. 120 has been rightly applied by the Court.

Amolak Ram *v.* **Lachmi Narain**, I. L. R., 19 A., 174. This decision has come upon us by surprise. The Transfer of Property Act has been in existence now for fifteen years, and we are surprised to be told at this time of day that there is anything in the Act which prevents an award of interest in a mortgage suit up to the actual date of realization. Act XIV of 1882, the Code of Civil Procedure, is an enactment even later than the Transfer of Property Act and S. 209 authorizes the

award of interest up to the date of payment. That section applies to every decree for money and a mortgage decree is certainly a decree for money also. Even if there were not S. 209, there would be no question as to the power of the Court to award such interest. If it is competent, therefore, for the court to decree the payment of interest up to the date of realization, such interest would be recoverable from the defendant or the proceeds of the sale of defendant's property even if the portion accruing beyond the date mentioned in the mortgage-decree be not a charge on the property. It would then be a combination of a mortgage decree with a simple money decree.

Ram Lal *v.* **Tulsa Kuar,** I. L. R., 19 A., 180. We think the decision in this case is perfectly sound. The learned Judges attempt to distinguish the case from *Kanara Kurup* v. *Govinda Kurup,* I. L. R., 16 M., 214, but they fail to notice that that case is overruled in *Vallabha Valiya Rajah* v. *Vedapuratha,* I. L. R., 19 M., 40. There is no doubt that a discretion is vested in the Court to extend the time at the instance of the mortgagor for payment of the mortgage money; and where good cause is shown the Court may extend the time, the extension not being obligatory in every case. Where no application has been made, the decree must operate according to its tenor.

Kashi Prasad *v.* **Sheo Sahai,** I. L. R., 19 A., 186. The decision in this case which proceeds upon the same principles as those laid down in *Amolak Ram* v. *Lachmi Narain, supra,* shows a most rigid adherence to the language of S. 86 of the Transfer of Property Act. But S. 86 was never intended to preclude an adjustment certified to the Court under S. 258 being carried out in execution if that was the intention of the parties, or an agreement to pay a larger sum in consideration of further time being given to the judgment-debtor being similarly enforced. This is acting upon the letter of the statute with a vengeance without taking other enactments about the subject into consideration.

In the matter of the petition of **Barkat,** I. L. R., 19 A. The principle that an accused person cannot be a witness is extended by *Blair,* J., to an affidavit in support of an application for revision of the sentence passed upon him. If he cannot depose as a witness, he cannot make an affidavit. Appeal and revision are simply further stages of the same criminal proceedings. So long as the disqualification to testify subsists it seems to us that no exception can be taken to this decision.

David Hay *v.* **Razi-ud-din,** I. L. R., 19 A., 202. This decision dissents from the conclusion of the Madras High Court expressed in

several cases, beginning with *Sami Achari* v. *Somasundram Achari*, I. L. R., 6 M., 119. We ourselves ventured to express our dissent from that conclusion in a long note in 2 M., L. J. We adhere to the opinion then expressed and hope that the question will be settled by the Privy Council soon.

SUMMARY OF RECENT CASES.

Contempt of Court—Breach of injunction by person not enjoined.

Seaward *v.* **Paterson** [1897, I, Ch., 545, C. A.]

The orders of a Court of Justice ought to be obeyed, and cannot be set at naught and violated by any member of the public, either by interfering with the officers of the Court or by assisting those who are bound by its orders. The Court has undoubted jurisdiction to commit for contempt a person not included in an injunction, who, knowing of it, aids and abets the person bound by the injunction in violating it.

Paterson was lessee of the first, second and third floors of a certain house, and his lease contained a covenant that he would not do or suffer anything which should tend to grow to be an annoyance or nuisance to the lessor or to other tenants of the lessor, or allow the premises to be used otherwise than as a private club. The ground floor of the house was occupied as a public house by one Dennigton. Paterson, contrary to the covenants in his lease, allowed his floors to be used as an arena for boxing matches. Dennigton thereon got an order of injunction from a Court of Justice prohibiting him from using his premises contrary to the covenants. But Paterson disobeyed the injunction and allowed boxing matches to be had on his premises even after the issue of the injunction, and in this he was assisted by the defendant who was fully aware of the proceedings against Paterson and of the injunction granted.

Held: that, although the defendant was not bound by the injunction and not liable for breach of it as such, he was still liable for contempt of court.

Public nuisance on private land—Owner responsible.

Attorney-General *v.* **Tod Heatley** [1897, I, Ch., 560 C. A.]

The law as propounded by the Judges in this case is rather too severe on owners of private property, and the right claimed for the public is so wide as to be unnecessarily inconvenient to private owners. Their

Lordships laid down in this case that an owner and occupier of property is under a strict duty to see that there is no public nuisance on his property, and this whether the nuisance was caused by himself or by any other person.

The defendant was owner of a vacant piece of land of about an acre in extent which he had inclosed by a hoarding six feet in height. The neighbourhood was inhabited chiefly by the poorer classes who were in the habit of throwing all their dirt and rubbish into this land over the hoarding and through breaches in it. Dead dogs and cats, vegetable refuse and such things had been thrown in and the whole site became a dreadful nuisance. The vestry sued by the Attorney-General for an injunction against the defendant to abate the nuisance. The defence was that the defendant had done all in his power to prevent people from throwing rubbish by putting a proper and sufficient hoarding, and that it was owing to the defective police and sanitary arrangements that the nuisance came into existence. The Court of Appeal held that the plaintiff was entitled to the injunction and the defendant was under a bounden duty to abate the nuisance, notwithstanding that it was caused by persons over whom he had no control. The question naturally arises, what is the owner to do under the above circumstances? Is he to keep watch and prosecute or sue for the benefit of the public every person whom he finds throwing rubbish on his land; apparently the rubbish is no nuisance to him so as to induce him to sue for his own benefit.

Vendor and purchaser—Implied covenants.

Broomfield v. Williams [1897, I, Ch., 602, C. A.]

This case is an application of the well-known doctrine that a grantor cannot derogate from his own grant; but great care must be taken in ascertaining what was actually granted in any particular case to which the principle has to be applied. The plaintiff bought a portion of some 'building land' from the defendant who was owner of it. The conveyance included a house built by the defendant with windows overlooking the land retained by him and referred to in the deed as 'building land.' But the conveyance contained no reservation of any right to enable the grantor so to build on the adjoining land as to darken the windows in the house which he had conveyed to the plaintiff. The defendant subsequently built a house on that land so close to the plaintiff's as to interfere with the access of light to his windows.

Held by the Court of Appeal that, on the principle that a grantor cannot derogate from his own grant, the plaintiff had *primâ facie* an

unrestricted right to light as against the defendent, and the burden of setting limits to that right lay on the defendant.

Swansborough v. *Coventry* [1832, 2 Moo. and Sc. 362,; 9 Bing, 305, approved of.

Birmingham, Dudley and District Banking Company v. *Ross* (1888) 38, Ch. D. 295, and *Myers* v. *Catterson* (1889) 43, Ch. D. 470, discussed and explained.

Inn-keeper—Common law liability.

Lamond *v.* **Richard** and **The Gordon Hotels,** Limited [1897, I, Q. B. 541, C. A.]

The plaintiff went to a hotel in Brighton, and went there with the intention of staying at the hotel. She was taken in as a traveller and given rooms, and she stayed there for a period of ten months. It was then intimated to her that she must leave the hotel, but this she refused to do. Then reasonable notice was given to her to leave, and on her still refusing to leave, advantage was taken of her absence from the hotel and her things were brought down and put outside, and on her return she was refused admittance. She then sued to recover damages for unlawfully ejecting her. The Court below had found that she was originally taken in by the hotel-keeper as a traveller, but that she subsequently ceased to have that capacity.

Held, that under the above circumstance the plaintiff must be non-suited. The common law liability of an inn-keeper to receive and lodge a guest attaches only as long as that guest is a traveller, and a person who has been received at an inn as a traveller may subsequently cease to be one. In determining whether his status has been so changed or not, the length of his stay at the hotel is one important consideration. If the guest has ceased to be a traveller, the inn-keeper is not bound to supply him any further and has a right to send him out after reasonable notice.

Public servant—Agent of the Crown—Limit of agency.

Dunn *v.* **Macdonald** [1897, I., Q. B. D., 555, C. A.]

In this case (*vide* p. 165 *ante* for facts) the Court of Appeal affirmed the decision of *Charles*, J., and held that the doctrine that an agent who makes a contract on behalf of his principal is liable to the other contracting party for a breach of an implied warranty of his authority to enter

into the contract, is not applicable to a contract made by a public servant acting on behalf of the Crown. *Lord Esher*, M. R., said: "No action lies against a public servant upon any contract which he makes in that capacity, and an action will lie only upon an express personal contract. It cannot be pretended in this case that the defendant made any express personal contract, and there are decisions covering over a hundred years or more that, under such circumstances, he cannot be made liable."

Breach of contract, damages for—Effect of breach being caused by act of promisee.

Dodd *v.* **Churton** [1897, I., Q. D. 562, C. A.]

The action was to recover the balance due to the plaintiff, a builder, upon a building contract. The defendant made a counter-claim for money due to him as liquidated damages for non-completion of the work within the time specified by the contract. Under the contract the work was to be finished within a particular date, and in default, the builder was to pay £2 liquidated damages for every week's delay after the appointed time. There was also another stipulation in the contract, that any additional work which may be given should be specially paid for. It was admitted that extra work was ordered, and that the necessary result of the builder's having to do that work was that the original work was delayed. It was held by the Court of Appeal that the general rule applied that where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default and that the defendant's counter-claim must therefore be dismissed.

Divorce—Maintenance—Voluntary Allowance.

Bonsor v. **Bonsor** [1897, I, Probate Div., 77.]

On the petition of a wife there was a decree for dissolution of marriage, and on an application for permanent maintenance the Registrar reported thus: "The respondent has no means and is indebted to his brother in the sum of about £18,000, who nevertheless allows the respondent the sum of £60 as long as he stays outside this country; the respondent is also indebted to other persons in various sums, amounting together to £1,700," and he submitted that the respondent should be ordered to pay the petitioner the sum of £15 a month. Objection was taken to this by the respondent on the ground that the £60 allowed to him was only a voluntary allowance and ought not to be

taken into consideration in calculating the rate of maintenance. The objection was, however, overruled, and the President, *Sir F. H. Jeune*, held on the authorities that incomes over which the respondent had no legal claim may also be resorted to for the purpose of ascertaining the rate of maintenance.

He said:—"Nor can I see any reason why a wife on separation or divorce from her husband should not, in a proper case, have a share of any kind of income, in the whole of which she could have participated as his wife. Injustice to the husband is prevented by the provisions of the Act which allow the maintenance to be reduced or suspended, if his means of paying it fail. The report of the Registrar will therefore be confirmed with costs."

Estoppel—Limitation.

Dalton v. Fitzgerald [1897, I., Ch., 440, per *Stirling, J.*]

Where a grantor who has no title or only an imperfect title to a particular piece of land purports to grant it by deed to A for life with remainders over, and A enters under the deed and acquires a good title against the true owner, A is estopped as against those in remainder from disputing the validity of the deed; and the Statute of Limitations cannot also be called in aid, for they ought not to be so construed that a person claiming a life estate under a deed or will shall enter and then say that such possession was unlawful so as to give his heir a right against a remainderman. On this point the Master of the Rolls said in *Board v. Board* (L. R. 9, Q. B., 48.);—

"You have entered under the will of a man who had possession as far as you are concerned: possession is the fee: you cannot say, you having no title, that he had less than the fee which he purported to devise. You are estopped from denying his title to dispose of that fee . . . . You have got possession under that will, and possession in law, as far as you are concerned, of the fee. All that I understand. That is a little extension of the doctrine of estoppel by contract, but it follows on the same principle."

Care must, however, be taken to distinguish the above from another class of cases, namely, where a person having a good title to property, has not effectually devised it, and the tenant for life of other property effectually devised by the will has entered, just as if it had been validly devised and acquired by possession a valid title against the heir. There is a conflict of decisions with respect to this class of cases,

Estoppel—Company.

Frederick Bloomenthal *v.* **James Ford** (liquidator) [1897, Appeal Cases, 156.]

In 1894 the appellant, a stationer in the city of London, who had been supplying a certain limited company with stationery, was asked to lend the company £1,000, which he agreed to do upon the terms that he should have the company's acceptance for £1,000, and as collateral security 10,000 of the company's fully-paid shares of £1 each. The appellant advanced the money and received the company's acceptance for £1,000 and ten certificates. Each certificate stated that the appellant was the registered proprietor of 1,000 shares of £1 each in the company, numbered —— to ——, and "that on each of such shares the full amount had been paid." The shares that were thus handed over were really part of the unissued shares for which the public had not applied; but the appellant believed the representation on the certificates that they were fully paid-up shares till December 1894 when he was told by a friend that they were not so. He then gave notice of an application to the company to remove him from the list of shareholders. In the meantime the company had gone into winding up and the liquidator placed the appellant on the list of contributories with respect to the shares standing in his name:—

Held (reversing the decision of the Court of Appeal)

that the position of the appellant was not that of a member of the public who had applied for an allotment of shares and accepted an allotment under the impression that it created no liability, when in truth according to law it did create a liability;

that the transaction was one of a mere loan to the company who were to give as security "fully paid-up shares";

that as the appellant had advanced his money believing and acting upon the representation that the shares well fully paid, the company and the liquidator were estopped from alleging that the shares were not fully paid and that the appellant was entitled to have his name removed from the list of contributories.

The observations of Lord Herschell upon the doctrine of estoppel are really instructive, especially upon the question as to how far a person to whom a representation is made, is bound to enquire before believing and acting upon it.

Fiduciary relationship between Co-mortgagors—Power of sale of mortgagee —Sale to one of two co-mortgagors.

John Kennedy *v.* De Trafford [1897. Appeal Cases, 180.]

There is no fiduciary relation between two co-owners of real estate as such. The mere fact that one tenant-in-common collects and receives rents of the other tenant's moiety also at his request and manages the whole estate, does not create a relationship of trustee and *cestui que trust* between him and the other.

The only obligation that is incumbent upon a mortgagee exercising his power of sale is, that he should exercise it in good faith without any intention of dealing unfairly by his mortgagor. It is difficult to define exhaustively this good faith, as the circumstances of each case will have to be looked at for that purpose; but it does not amount to taking all reasonable precautions in the exercise of the power of sale.

D and K held certain real estate as tenants in common. They were co-owners each holding an undivided moiety. Both together mortgaged the whole estate to T. After the mortgage the whole estate was left in the possession of D in pursuance of a voluntary arrangement between him and K, under which he was to collect the rents and pay the money into a bank, and each was to draw on that account to the extent of his own moiety. After some time the mortgagee grew uneasy about his security and pressed his mortgagor for payment and finally gave notice to each of them separately that he would realize his security if he can obtain his principal, interest and costs; and that, unless they were prepared to pay him off, he would forthwith proceed to effect a sale by private treaty. To this K sent no reply. After a reasonable time from the date of this notice the mortgagee arranged with D for sale of the estate and sold it to him for principal, interest and costs. Subsequently K sued the mortgagee T, and D, his co-owner, to set aside the sale, or at least for a declaration that D's purchase was to his benefit to the extent of one moiety of it.

Held, that under the circumstances the sale by the mortgagees was one made in good faith;

that the fact of the management of the whole estate by D did not create a fiduciary relationship between him and K, and that neither under the general law nor under the circumstances of the particular case could D be considered trustee to K of one-half of the property purchased by him from the mortgagee.

The decision of the Court of Appeal [1896, I Ch. 762; 6 M. L. J. 282] affirmed.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Harvard Law Review for May and June (*in exchange*).

The Albany Law Journal for May and June (*in exchange*).

The University Law Review for May (*in exchange*).

The Educational Review for May (*in exchange*).

The Calcutta Weekly Notes for May and June (*in exchange*).

The Green Bag for May and June (*in exchange*).

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Certain Suggestions of the Government of India in regard to Appeals in Civil Suits.

The following Judicial paper No. 5, Judicial, 390, addressed from the Secretary to the Government of India, to the Chief Secretary to the Government of Madras, dated Calcutta, the 30th March 1897, is published for general information.

"The attention of the Government of India has been called to the enormous, and apparently increasing, number of appeals in civil suits.

2. The total number of civil suits instituted in India in 1894 was 1,743,640. Of this number only 395,212 were contested, yet the appeals numbered 113,319, that is to say, about 30 per cent. of the contested cases, and about 6 per cent. of the total suits instituted were appealed.

An examination of the English statistics of 1894 shows that the number of suits instituted in inferior Courts in England was 1,136,042. The number of appeals was 289, that is to say, about one per 4,000, or ·000 25 per cent. In other words, for every appeal in England, there are 240 appeals in India. In comparing India with England, it must be borne in mind that in England there is no intermediate appeal, but that the appeal lies direct from the inferior Court to the High Court.

3. It appears from the Civil Justice reports that in 1894, there were 1,600,595 suits instituted outside the Presidency towns which were valued at sums not exceeding Rs. 500. If to those figures be added the cases disposed of by Presidency Small Cause Courts, it seems that the great mass of Indian litigation is concerned with small causes which in England would be dealt with by the County Courts in the exercise of their summary jurisdiction. According to the returns for 1895, there were in that year 1,179 appeals (first appeals 7, second appeals 1,172) to the High Court at Calcutta in cases where the value of the suit did

not exceed Rs. 100. The corresponding figures in Madras were 893 (first appeals 17, second appeals 876), at Allahabad 436 (first appeals 5, second appeals 431). The number of appeals below this value filed in the High Court at Bombay is not ascertainable from the Civil Justice returns.

4. It appears to the Government of India that the present license of almost unlimited appeal may be considerably reduced with great advantage, not only to the litigants, but also to the courts of first instance and the appellate courts.

Protracted litigation gives the man with the larger purse an unfair advantage, and it has been recognized in the Small Cause Court Acts that there are important classes of cases in which a quick and decisive settlement of disputes is the paramount consideration. Under the existing system the courts of first instance feel no responsibility beyond escaping the censure of the courts above them, to which they know their decisions will be appealed, and tend to become timid and technical, and the High Courts in their turn, instead of having the leisure for the deliberate disposal of really-important issues, are burdened with a host of petty and often frivolous cases which should be settled by courts of a lower dignity.

5. Several suggestions have been made to the Government of India for limiting the right of appeal and reducing it within reasonable limits. The Government of India recognize that the circumstances of the different provinces of India are so various that it might not be expedient to enact a uniform rule. Much must depend on the relative trustworthiness and legal attainments of the lower Courts, and the habits and wishes of the people constitute also a material factor in the case. In these circumstances it is possible that a suggestion which might be suitable for one province might not be entirely suited for another. With these remarks I am to commend to the attention of the Governor in Council the suggestions enumerated below, and to request that the Government of India may be favoured with the opinion of His Excellency in Council as to their applicability to the Madras Presidency with any further remarks that His Excellency in Council may think fit to offer.

(1) That where appeals from lower Courts are heard by a single Judge of the Court, there should be no appeal from this decision, under the Letters Patent or otherwise, except by leave of the Judge.

(2) That in original suits heard by a single Judge of the High Court, where the value of the subject-matter does not exceed (say)

Rs. 2,000, there should be no appeal from his decision or from any interlocutory order unless by leave of the Judge. For this purpose an application for a new trial would be included in the term appeal.

(3) That in cases where the amount involved is large (say, Rs. 10,000 where an appeal lies to the Privy Council) and an appeal is a practical certainty, the parties should have the option of commencing the suit in the High Court.

(4) That security for costs should be given in every appeal unless the court, for good reason, dispenses with it, and that where there is a second appeal from concurrent decisions, substantial security should always be given.

(5) That the power of revision conferred on the High Courts by section 622 of the Code of Civil Procedure should be curtailed, and that this jurisdiction should be confined to cases where the High Court in England could issue a mandamus or prohibition.

(6) That except by leave and except in certain cases affecting land, there should be no second appeal where the value of the suit does not exceed some fixed limit, say, Rs. 500.

(7) That appeals on questions of procedure should be cut down, and that except by leave there should be no second appeal on any question of procedure.

(8) That in the Presidency towns, where the Small Cause Courts have Barrister-Judges, those Courts should be remodelled on the English County Court plan, that is to say, that the jurisdiction as to the class of suits cognizable by them should be enlarged and that the English summary procedure should be adopted.

(9) That Small Cause Court powers should be more freely conferred on the mufassal courts, and that all suits for liquidated demands within the pecuniary limits of their jurisdiction should be cognizable by them.

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Charging the Jury.—The numerous comments made in newspapers and legal periodicals upon the charge to the jury in the trial of the Bram murder case, and upon the opinion of the court on refusing a new trial, bring into notice the marked difference in practice between the Federal courts and most State courts with respect to the judge's commenting upon the evidence in the charge. There can be little doubt

that the charge in this case was entirely unexceptionable, according to the rule laid down in the Federal courts. Following the established English rule, the Supreme Court of the United States has often held that it is proper for the judge, and sometimes even incumbent upon him, to express in his charge to the jury his own opinion of the weight of the evidence that has been offered, and of the facts which he considers it to prove, provided always that he clearly instructs the jury that the determination of all questions of fact is left to their own independent judgment. In almost all State jurisdictions, on the other hand, an increasing jealousy of the possible influence of the judge upon the jury's verdict has by various means made any expression of opinion by the judge upon questions of fact a ground for exceptions. In several States, such as Arkansas, California, Nevada, South Carolina, Tennessee, and Washington, any comment upon the evidence by judges in charging a jury, is prohibited by the State Constitution. In very many other States, of which Massachusetts is one, the same result is reached by a statute. To allow exceptions upon such grounds, in the absence of any statutory provision, would seem to be an unwarrantable departure from the old common law view, which was that it was the duty of the judge to assist the jury in the determination of matters of fact by his advice, founded on his extensive experience and his superior training in habits of logical thought. How positive and urgent such advice may be, when the jury are at the same time instructed that the final decision is left entirely to their judgment, is a question which must always depend to some extent on the temper of the courts, and of the community in which they administer justice; and accordingly even the Federal courts are more inclined to restrict the action of judges in this respect than are the English courts. The effect of the statutes referred to is to prevent the court from in any way aiding the jury in the determination of matters of fact, and to render it extremely difficult for a judge to sum up the evidence without laying his charge open to exceptions. It is certainly the opinion of many lawyers that juries are more apt to go wrong in their verdicts under this rule of practice than under the rule of the Federal and of the English courts. It would perhaps be well for those who are anxious for the preservation of the jury system, at a time when much dissatisfaction is felt with its practical operation, to consider whether the danger of judges influencing juries to give unjust verdicts is so serious as to make it advisable to diminish the practical efficiency of jury trials by preventing the judge from giving the jury the benefit of his generally superior powers of reasoning and wide experience in the facts of cases;—*Harvard Law Review.*

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Locality of Crime.—The Court of Appeals of Kentucky, in the recent case of *Jackson* v. *Commonwealth*, 38 S. W. Rep. 1091, has had to deal with the question of the criminal intent and the locality of crime in a difficult form. In Ohio, the defendants administered cocaine to a young woman, intending serious bodily harm. They brought the apparently lifeless body into Kentucky, and, in order to conceal the crime, cut off the head, believing that she was already dead. But the evidence shows that, until the decapitation, she was alive; and the question is raised whether the crime of murder was committed within the jurisdiction of Kentucky.

The prisoners were convicted; and in sustaining the conviction the court is right, although the reasoning is not entirely satisfactory. The fact that the poison was administered in Ohio offers little difficulty. The girl did not die of the poison; she died from the act of violence which took place in Kentucky. Apart from this, two difficulties are to be met before we reach the same conclusion as the court. The act causing death in Kentucky is present; but to constitute the crime of murder, there must be also the general criminal intent and the malice aforethought. If we can find the crime of homicide, we have the requisite malice, in its technical significance, from the fact that a dangerous weapon was used. But it is urged that there was no general criminal intent, for the killing was done under a mistake of fact; and, further, that it is impossible to consider what took place in Ohio with reference to the act done in Kentucky. To this there are two answers. In the first place, the act of decapitation itself was criminal, the wanton desecration of a dead body being looked upon as *contra bonos mores;* this alone is sufficient to supply the intent. But even were this not true, the general criminal intent may be supplied constructively from the criminal intent to poison. This is the ground the court takes. As evidence of this intent, acts in another State may be considered. Intent does not depend upon jurisdiction; it is a mental quantity, evidence of which may be received from any part of the globe. And as for the existence of the intent at the time of the killing, it would be a strange anomaly if it were law that the wicked state of a man's mind ceases as soon as he believes in the death of his victim, so that he is not responsible for the actual harm resulting from continued indignities. His particular acts may not accomplish the end he contemplates; but by construction the criminal intent is continuous, until the last step is taken in finishing the crime and in concealing its traces. Therefore, in this way too the general criminal intent existed at the time of the killing; and that intent, together with the "malice" implied from the use of a dangerous weapon, makes the act which was done murder.

This result is sanctioned by justice as well as by logic; for otherwise an atrocious murder, owing to an error in its commission, would be nowhere punishable,—not in Ohio, because the poisoning which took place there did not result in death,—not in Kentucky, because the criminality of the act would be held to have ceased before the death :—*Harvard Law Review.*

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Limitation of the Right of Self-defence.—In the case of *Dabney* v. *State*, 21 So. Rep. 211, the Supreme Court of Alabama has placed a new restriction upon the right of self-defence. The trial judge instructed the jury, in a trial for murder, that if the defendant went to another's house, intending illicit intercourse with that other's wife, and armed himself, though merely for defence in case of attack, he was deprived of the right to kill in self-defence. The Supreme Court supports this position; in fact, the language of the court implies that in any case a man taken in adultery with another's wife cannot justify himself in killing the husband even in self-defence. There is no doubt that, if the defendant committed the wrongful act with the express purpose of creating an occasion for killing, he forfeited the right. In the absence of this express purpose the question is: Did the act amount in law to a provocation, and was the attack in fact provoked thereby? The court rightly answers, Yes. That the law recognizes adultery as provocation for an assault by the husband is shown by the fact that, if death results, the husband is held guilty not of murder but of manslaughter. It is a firmly established principle, that he who provokes an attack is not justified in taking life to protect his own. Although in this case the defendant's motive was not to cause the affray, he voluntarily entered upon an act which the law holds to be a provocation, and which did in fact provoke the conflict that took place. Under these circumstances, the court was right in holding that he could not avail himself of the right of self-defence.

The court then proceeds to support the charge on other grounds: one who enters on a wrongful act, and contemplating interference on the part of another arms himself with a deadly weapon, in order to take the other's life if necessary to save his own, is guilty of murder if he kills. This cannot be supported. The fact that the defendant armed himself merely in view of defending himself cannot militate against him, except as bearing upon his knowledge of the possibility of his being attacked. Does then the fact that a wrongdoer knows that the act may lead another wrongfully to attack him necessarily deprive him

of the right of self-defence? It would seem that this hardly can be so. In applying the rule, confusion arises in many cases from a loose use of the word "provoke." If the defendant knew that trouble might arise, and yet persisted in his act, he might be said to have "provoked," in the sense of "given rise to," the affray. But did he in the legal sense provoke an attack? Was his act legally to be regarded as provocation of the murderous assault? Although not supported by the majority of the cases, the court of Kentucky is right in saying that a defendant killing in self-defence is not guilty unless he made it necessary or excusable for the deceased to put him in danger. *Thompson* v. *Commonwealth*, 26 S. W. Rep. 1100. The conviction here was rightly affirmed, not because the defendant armed himself against a probable attack in the course of his wrongdoing but because his wrong was a provocation of the attack upon him:—*Harvard Law Review.*

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Great English Judges.—Lord Chancellors.—"The golden period of equity" is the phrase often used in describing the years from 1737 to 1756, when Philip Yorke, Lord Hardwicke, was the presiding genius in the Court of Chancery. He disposed of the many causes which came before him with a rapidity and accuracy which gave wide satisfaction, and in so doing laid down general principles which "perfected English equity into a symmetrical system." Lord Hardwicke's manner in court approached the ideal. A patient, eager listener, willing to be instructed by counsel, and giving his undivided attention to the argument, he made up his mind only after hearing both sides, and expressed his opinions in carefully prepared written judgments. A pure and fearless judge, he had a sincere passion to advance the science of law. As a man, Lord Hardwicke is scarcely so much to be admired. Determined to get on in the world, from early youth he was relentlessly successful. No failures and no follies mark his steady advance along the path to the Woolsack through the positions of Solicitor-General, Attorney-General, and Chief Justice to the King's Bench. He seems to have resolutely shut out from his life all which could not aid his ambition. Avaricious, arrogant in society, he forgot his own humble birth, he forgot old friends who had helped him, and sought and cared only for the rich and the great. In politics Hardwicke was a Whig, and was almost as able as a statesman as he was splendid as a judge. During Newcastle's ministry he was virtually the head of the nation. Lord Hardwicke was strikingly handsome, and to his personal attractiveness much of his early success was due.

A small, well-featured man, sitting on the bench with an air of dignified repose which did not betray that he was paying little attention to the rambling and unchecked arguments of the counsel before him; patiently amusing himself with his private correspondence till the causes of the day were over, then taking all the papers involved to be considered at his leisure; finally, having been at greatest pains and labor to reach a decision in each case, delivering, often years after the cause was first heard, judgments which were generally spoken without the aid of a single note;—such was perhaps the most famous of Chancellors, John Scott, Lord Eldon. With the exception of the year 1806, he presided in Chancery from 1801 to 1827. His prevailing characteristics as a judge were a sincere desire to do justice between man and man and an almost exaggerated fear of erring either as to law or facts. Although, combined with his naturally dilatory habits, these attributes made the delays in Chancery matter of common reproach and ridicule, they resulted in an almost unbroken line of fair and correct decisions. Lord Eldon's private life was not lacking in romantic incident. He came from a poor and humble family, narrowly escaped first the career of a coal-fitter, and later that of a country parson; he eloped with his wife in genuine story-book fashion, taking her from her second story window by means of a ladder one dark night; and he finally became a master of English law by hard and unremitting study. Eldon was, however, versed only in law. He knew nothing of general literature, had no imagination or artistic sense, and when not attending to state or judicial business preferred the society of his inferiors to that of men and women of wit and understanding. As a statesman he was distinguished for his bitter hatred of the Catholics and his violent opposition to every species of reform.

For a brief period in 1868, and again from 1874 to 1880, the head of the English judicial system was Hugh McCalmont Cairns, Lord Cairns. He is considered by many to have been the ablest lawyer of his time. He was not, however, deeply versed in black-letter learning, like Willes and Blackburn, but was distinguished rather for his exhaustive discussion of a matter on principle. His great attribute was lucidity. Probably no other judge of any time has possessed a power of clear statement equal to that of Lord Cairns. One of his biographers has described his appearance in court to be "cold, impersonal, like an intellectual machine minting law." Though born in Ireland, Lord Cairns was of a Scotch family, and was through life an ardent evangelical churchman. His great piety is said to have been something of a jest among members of the bar, and to have been traded upon by the unscrupulous, like the

vice of another man. He was almost as great a statesman as a judge, and he was influential in passing the Judicature Acts. He took his recreation in the hunting field on Saturdays and in shooting on the moors of Scotland in the vacation. His great career is the more remarkable in view of the fact that he had to struggle continually with physical weakness and illness, and to take constant precautions in order to be fit for any work:—*Harvard Law Review.*

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Conflict of Laws—Domicile—Divorce.—A wife left her husband in New York and went into another State, where she secured a divorce and married another man. She then returned with him to the State of her former husband. *Held*, that the divorce and subsequent marriage were void. *McGown* v. *McGown*, 43 N. Y. Supp. 745.

It is generally conceded that a wife cannot acquire of her own accord a separate domicile from her husband's. *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; and as it is settled law that a divorce can be obtained only at the domicile, it was not improper to regard this divorce as invalid. 1 Bishop, Mar., Div., and Sep. § 837. And while it is the rule that the validity of marriage is determined by the law of the place of its consummation, Story, Conflict of Laws, 6th ed., § 113, for the New York court to recognize the subsequent marriage would be to consider the woman in the impossible relation of wife to two husbands. Story, *ib.*, § 373 *f*:—*Harvard Law Review.*

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Criminal Law—Insanity—Burden of Proof.—*Held*, on a trial for murder, where the defence is insanity, the burden of proving such defence is on the defendant, but he is not required to establish his defence beyond a reasonable doubt. *State* v. *Larkin*, 47 Pac. Rep. 945 (Idaho).

The ruling in this case and in the similar recent case of *State* v. *Scott*, 21 So. Rep. 272 (Ala.), is in accord with the practice in most States and with the majority of the text writers on the point. The rule is, however, a disputed one, and the better law would seem to be that of Michigan (*People* v. *Garbutt*, 17 Mich. 9) and several other States, as well as that of the Federal courts (*Davis* v. *U. S.*, 160 U. S. 469). These hold that the burden is upon the prosecution of proving both the elements of the crime, *viz.*, the act and the intent to commit; and that while the general presumption is that the latter is present, if the accused brings forward any evidence tending to put that question in doubt, the necessity for proof of this part of its case by the State is equal with that of proving the act itself:—*Harvard Law Review.*

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Criminal Law—Self-defence.—Where defendant and his companions with guns in their hands unlawfully entered a house in which deceased was a guest, and were ordered out by the latter, who followed them to the door, and was shot, an instruction that if the defendant in good faith abandoned the difficulty and was leaving the house, and deceased followed and pointed his gun, defendant had a right to defend himself even to taking life, if necessary, was properly refused. *Crawford* v. *State*, 21 So. Rep. 214 (Ala).

The point of law is beyond dispute that a person cannot justify a homicide by the plea of self-defence, if the necessity for it results from his own wrongful act. But it is also equally well established that, if a person in good faith retires, he acquires the right of self-defence if assailed by the one he had previously attacked. The ruling in this case, that the withdrawal must be manifest, seems good law. The defendant having put the life of the deceased so in peril that he is under the necessity of using force, even to death, to defend himself, ought at his own peril to make it plain that that necessity no longer exists. This view is supported by *Parker* v. *State*, 7 So. Rep. 91 (Ala) :—*Harvard Law Review.*

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Evidence—Opinion—Mental—Condition.—A witness, after stating many facts relating to a testator's conduct, and that the testator was personally known to him, was asked whether in his opinion the testator was competent to transact ordinary business. *Held*, that the answer was inadmissible as a conclusion involving expert knowledge. *Torrey* v. *Burney*, 21 So. Rep. 348 (Ala).

By the better considered cases, a non-expert is now allowed to express his opinion as to one's insanity, provided he has set before the court sufficient facts on which to base his opinion. The decision in the principal case might well have been otherwise. The question asked was not a hypothetical one. Sufficient facts had been testified to by the witness, and he should have been allowed to state the impression they had made on his mind. This is opinion in form only; in substance it is a statement of fact. *Life Ins. Co.* v. *Lathrop*, 111 U. S. 612. It is difficult to see, on the facts of the principal case, any valid distinction between a question as to one's insanity and the question as to his competency. See *Wright* v. *Doe d. Tatham*, 5 Cl. & F. 670 :—*Harvard Law Review.*

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Quasi-contracts—Agent's compensation for services after principal's death.—A principal employed an agent to collect his rents and to care

for his real estate. The principal died intestate, and left no known heirs. The agent, with knowledge of the principal's death, continued to collect the rents and to care for the real estate. *Held*, that the decedent's estate must pay for these services. *In re Bryant's Estate*, 36 Atl. Rep. 738 (Pa).

As death revoked the agency, and as there were no circumstances indicating ratification, the recovery must be worked out upon theories of quasi-contract. The requirements essential to a quasi-contractual recovery were present in this case, according to the court's view of the facts. Obviously, the former agent did not intend to serve without compensation. Obviously, too, he was no mere meddler; for, as the court explains, in the extraodinary state of facts he owed "at least a moral duty to look after the property for the real owner, whoever he might prove to be." Finally, the fact that the estate was actually benefited is apparently taken for granted in the court's statement that, according to the finding of the court below, the former agent "had rendered services to the estate." Indeed, though there is a surprising dearth of authority, it seems clear that the court's view of the law is correct, though there certainly is a question whether the facts indicate that the estate was benefited in the least. The facts are more fully reported at an earlier stage of the case, in 35 Atl. Rep. 571, and 176 Pa. 309:—*Harvard Law Review*.

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Torts—Public Nuisance—Special Damage.—The defendant had unlawfully erected a fish trap in a navigable stream in such a way as to obstruct navigation and prevent the plaintiff from carrying on his business of fishing. *Held*, that the plaintiff suffered special damage, so that he was entitled to an injunction against such obstruction. *Morris* v. *Graham*, 47 Pac. Rep. 752 (Wash.).

The rule is generally stated to be, that, in order to give a private right of action for a public nuisance, the damage must be different in kind, not merely in degree, from that suffered by the public. Here the plaintiff was prevented from plying his customary trade, and in that his loss differed in kind from that of the public. The fact that the public also had the right to fish in the stream is immaterial, because they had never exercised it, and would suffer no loss, except in contemplation from its being interfered with. *Mill Co.* v. *Post*, 50 Fed. Rep. 429 *Rose* v. *Miles*, 4 M. & S. 101:—*Harvard Law Review*.

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We take the liberty of extracting the following from an interesting article styled "Her Majesty's Royal Courts of Justice" that appeared in the Albany Law Journal:—

What the London Barrister must do in order to be qualified to practice in them. An expensive course of training with the eating of many dinners necessary—An interesting and instructive interview with Mr. Sidney Phipson.

* * * * * * *

Qualification.

One of the first things I elicited from Mr. Phipson was that eight out of every ten barristers are college men. A university education seems to be almost a necessity. Very few successfully dispense with it. The preliminary training for the profession may be commenced at college. A barrister must have passed at least three examinations—

(1) Ordinary college examination in classics and general subjects;

(2) first examination in law called "Roman Law" examination;

(3) second and final law examination.

A college man will, in the usual course, secure the first of these, and by taking an "honors" degree of D. C. L. at Oxford, or LL. D. at Cambridge or London, will be excused the second or Roman law examination. If he only achieves an "ordinary" degree, he must still tackle the ordeal of "Roman Law." All non-collegiates, before they can study for the bar, must pass in classics and general subjects.

But, whoever they may be or whatever they may have done, all aspirants to the honor of wig and gown, whether collegiate or non-collegiate, must, subject to their satisfying the Boards of Examiners in Roman law, spend a three years' probation in one or other of the inns of court. The inns are four in number: Lincoln's Inn, Gray's Inn, the Middle Temple and the Inner Temple. They may be briefly described as societies or colleges for the study of the law, and are of ancient origin. Second to none in their jealous regard for the observance of professional tradition and etiquette, the inns maintain a strict watch over the attendances and behavior of the students. To insure that none of them shirk the obligation of duly "serving their time," a system of checking attendance exists, commonly known as "Eating Dinners in Hall."

The legal year is divided into four terms: Hilary, Easter, Trinity and Michaelmas. Three dinners in each term, or a total of thirty-six

during the three years' probation, have to be eaten at the Inn Hall by every college man. Non-collegiates must tackle twice this number, or seventy-two total-attendance at these dinners is checked by the "janitors," who keep the door and tick off each man's name as he enters. In one respect these janitors are remarkable men. Long practice has trained their memories to such perfection that among all the hundreds of dinners, no member, however erratic in his intervals of attendance, is ever met with a second request for his name from the same doorkeeper.

THREE YEARS' DINNERS.

The first two years of the student's inn membership are occupied in general study and coaching for his final examination. He never finds much difficulty in procuring professional tuition. Many impecunious members of the bar, who find time hang heavily on their hands, are only too willing to proffer their services in this direction for moderate fees.

Having duly passed his examinations, the student must devote the last year of his inn-dwelling to the somewhat expensive pastime known as "Reading in Chambers." The explanation of this, with its rather misleading title, is simply that he secures the free run of some practicing barrister's office, with liberty to scan all the briefs and watch the procedure. For this he has to pay the barrister the substantial fee of one hundred guineas ($525). At first sight it would seem safe to say that this must be a very valuable experience for the beginner. As a matter of fact, in the majority of cases, it is little better than a farce. To begin with, he generally shares the privilege with some half-dozen others. The barrister, as a rule, is a busy man, who has little time to waste over struggling readers. The consequence is they really get precious little for their money. They are supposed to make themselves acquainted with the details of every case that comes in, but it more frequently happens that long before they have had time to properly ascertain what a brief is about, let alone master its contents, the clerk annexes it for hurried conveyance to the law courts.

Notwithstanding the somewhat farcical nature of these proceedings, twelve months' experience of them is gravely considered as duly qualifying the student for a "call to the bar." This is quite a simple affair, involving but little ceremony. On a given date the governing body of the inn, known as the benchers assemble in the hall. The qualified students, having received written intimation of the event, meet them there, eat and drink at the benchers' expense, and afterward attend a sort of reception. The senior candidate makes a eulogistic speech,

receives a courteous rejoinder and the process is complete. Henceforth the new-fledged barrister, having provided himself with wig and gown, enjoys the freedom of Her Majesty's courts, and may begin to look about for business.

FINANCES.

If, like a prudent business man, he sits down now to take a retrospective survey of his financial position, he finds that his out-of-pocket expenses up to this point have reached a total of about $1,375. This includes a stamp fee of $250, which he has to pay to Her Majesty's exchequer for the privilege of addressing a British judge and jury. It also includes the $525 "reading" fee and all the incidental expenses attached to the routine of inn life. But it makes no allowance for the cost of maintaining himself during the long and tedious sojourn in the wilderness of probation.

There is an old saying in legal circles that "to succeed, a barrister must marry a rich solicitor's daughter," a theory which Mr. W. S. Gilbert has satirized in his "Trial by Jury." But there are one or two alternatives to this desperate expedient. The most promising one for the young beginner to adopt is—to join the ranks of the "devils." This, as an alternative to wedded wealth, is not such an infernal jest as it sounds. A legal "devil" is one who, attaching himself to some barrister in full practice, undertakes, in return for the experience thereby acquired, to assist him in routine work, to arrange details, collect figures, look up precedents and generally make himself useful. This arrangement has very great advantages for the beginner. He gets a thorough insight into practical work, and if at all energetic and wide awake, soon begins to make his mark. He gets no salary, but if his senior is practicing in the "Equity" division he is entitled to half the fees. In the "Common Law" division he would have no such right, but in either case the value of the experience gained more than repays him. To be "devil" to a popular man is a much-envied position. The attorney-general's devil is practically sure of a judgeship in time to come. Mr. Justice Wright and Lord Justice Smith are instances of attorney-general's "devils."

At the present day there are almost as many "special" branches in law practice as in the musical world. But the aspiring barrister cannot pick and choose. He must await his chance, and adapt himself to the sphere into which the tide may float him. Very few of the successful men of the present day occupy positions in that particular department of law practice to which they originally turned.

REAL BEGINNING.

After the "devil" has established a certain reputation and qualified himself for a sphere of independence, he may rent offices, engage a clerk and launch out "on his own." He would not take such a speculative step, however, until he had made something of a name and secured a measure of influence among the solicitors. And here let me say a word or two as to the position of solicitors and their relation to the barristers. The preliminary legal training is much the same in both cases. An intimate acquaintance with the vagaries of English law is essential. But barristers ascend to a higher grade of privilege, into which solicitors may not trespass. No solicitor is allowed to plead in any of the high courts. He may address the magistrates or minor judges of police and county courts, but before the robed dignitaries of Her Majesty's royal courts of justice he must be silent. The privilege of raising the persuasive voice of eloquence is reserved exclusively to the fraternity of wig and gown. The social position also of solicitors is distinctly inferior. Very few of them are university men. Their ranks are recruited chiefly from that section of the community which has come to be known as the "middle classes." Exceptions there are, of course. A few names could be mentioned that shine with the lustre of well-earned wealth and social influence. But they are not many, inasmuch as the profession has not that opportunity of attracting the public gaze which is the coveted possession of successful barristers.

But if the popularity of a Sir Frank Lockwood or a Sir Edward Clarke is denied them, solicitors have their compensating advantages. The inexorable law of etiquette forbids a barrister taking up a case except through the medium of a solicitor's "brief." In criminal cases this rule may be relaxed, but such an occurrence is rare. The best-known exceptions are those in which a judge requests some member of the bar present in court to defend a prisoner charged with murder or other serious crime, who has been unable, through poverty, to engage a lawyer on his own behalf.

BRIEFS AND FEES.

The brief is a document setting forth in detail all the facts and history of a case. In big *causes celébrès*, the brief sometimes attains a prodigious bulk. The mastering of its contents is an operation associated in the public mind with much burning of midnight oil. But this is a fallacy for which novelists are largely responsible. A barrister who knows his business will master a brief, however voluminous, at one reading. Long practice enables him to extract the salient points and determine at once the proper course to be pursued. Many eminent members of the bar will read half a dozen briefs in the morning before

going into court. When they have once perused and underscored them with their blue or red pencils, they may be relied upon to conduct the case in their usual masterly style, with no prompting whatever. Frequently they may be seen in court studying the points in one case while conducting another.

Barristers' fees are a variable quantity. As viewed in a solicitor's bill of costs, they look somewhat mysterious. A barrister's guinea is always £1 3*s.* 6*d.*; two guineas are invariably £2 7*d.*, and so on. This is explained by the fact that he charges a supplementary fee for his clerk at the rate of 2*s.* 6*d.* for every guinea he earns. No fee is less than a guinea. An unwritten law, dating from the time when the guinea was a coin of the realm, decrees that barristers must not accept silver. One transgression of this rule is recorded. A somewhat impecunious member of the profession accepted a few shillings as payment from a poor client. He was promptly called before the benchers of the inn to explain. His plea was, if he did not take gold, he at least took all the man had got, whereupon he was at once honorably acquitted. It was impossible to cavil at such a worthy upholding of all the traditions of the profession! Like physicians, barristers cannot recover their dues at law. The fee is supposed to be an "honorarium" which was not expected. There is a quaint survival of the alleged sensitiveness of barristers about fees. In their gowns may still be noticed a sort of long, narrow pocket arrangement, hanging down at the back of the left shoulder. Its occupation is gone now, but in the old time it was the recognized receptacle for the guineas which were supposed to be dropped in surreptitiously by the client. Very different is the brazen effrontery of these days, when eminent pleaders will calmly demand their fifty guineas "retainer" to induce them even to look at the proffered brief.

AS A Q. C.

A career of continued prominence and success may culminate at last in a desire on the part of the barrister to exchange his stuff gown for the silk robe of "one of Her Majesty's Counsel learned in the law." Now, this is an honor which, so far from being eagerly accepted as soon as offered, requires the utmost care and consideration. To use Mr. Phipson's graphic phrase, "It is a tremendous leap in the dark." A successful barrister may utterly fail as Queen's Counsel. The change may be likened unto a doctor giving up a lucrative practice in one town for another and entirely fresh one somewhere else. It is simply a speculation. Inasmuch as the laws of professional etiquette forbid him doing "junior's" work, he has practically to begin again and work up an entirely fresh connection. For this reason it is not uncommon for successful barristers to fight shy of the new dignity, preferring their substantial bird in the hand to any two speculative ones in the bush.

Should he decide to make the venture, his first step is to send in an application to the Lord Chancellor. In due time he receives an intimation that he has "been selected," and a request to wait on the Lord Chancellor at the house of lords on a given date to be sworn in. Next comes a demand from the Clerk of the Crown for the payment of fees amounting to £60 12s. A full-bottomed wig and a silk gown are the next indispensable items, the total cost of which varies from twenty guineas to twenty-five guineas. Add to this a full court livery, consisting of coat and vest, knee breeches, black silk stockings, dancing pumps, with steel buckles, white kid gloves and white dress tie, and you have the complete necessary outfit for a new Queen's Counsel. Having donned all this paraphernalia, and incidentally provided a new silk hat for his clerk, he joins the assemblage of other applicants in an ante-chamber at the House of Lords. Taking his turn in order of seniority, and attended by his clerk, he proceeds into the Lord Chancellor's room, where that great legal dignitary of the Crown, arrayed in plain clothes, is waiting to receive him. The Chancellor's clerk reads aloud a declaration of loyal service, etc.," which the embroyo Q. C. repeats after him. The Lord Chancellor then presents him with a crimson leather box, containing the "patent," engrossed on vellum, and sealed with the great seal of England. They then shake hands in solemn silence, no word having been spoken except the declaration.

This part of the ceremony completed, the new Q. C. proceeds at once to the law courts. He pays a visit to all the courts in order of their legal seniority, that happen to be sitting. The business in progress is abruptly interrupted by his entrance. The court usher rushes to the barrier gate and closes it. The presiding judge, having been provided with the new counsel's name on a piece of paper, delivers himself with grave solemnity of the following formula :—

"Mr.——, Her Majesty having been pleased to appoint you one of her counsel learned in the law, you will take your seat within the bar accordingly.

The barrier gate is thrown open; the Q. C. passes into the front row and bows to the judge, who bows in return. He then turns right about face and bows to the counsel present, who acknowledge the courtesy. Finally he bows to the junior barristers, who reciprocate the compliment. He then sits down. The judge asks, "Do you move, Mr.——?" Rising and again bowing, he answers, "No, my lord," and forthwith leaves the court. Having inflicted this ordeal on all the other courts, the new counsel is now regarded as duly initiated into the mysteries of the craft. All that remains for him to do is to have some large cards printed with

his name and the words. "On appointment as one of Her Majesty's counsel," in one corner. He leaves one of these with each judge, and is now free to come and go as he pleases.

The ultimate goal of a Queen's Counsel's ambition may vary according to his own taste and character. He may struggle for that avenue of legal dignity which leads from the judge's bench through the Supreme Courts of the Lords of Appeal to the Woolsack of the High Chancellor. Such a career is graced with unlimited dignities, but limited salaries. On the other hand, there are some few shining lights of the profession who possess a happy combination of great ability, a practical and democratic mind, a strength of will enabling them to resist the glamour of pomp and state, and, above all, a capacity for seizing upon their opportunities. Such men rapidly attain a position which enables them, financially speaking, to look down upon Her Majesty's judges and law lords, and even the High Chancellor himself. By the magic of their genius and boundless energy they reach and sustain themselves at the high-water mark of professional prosperity.

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Historic Collisions Between Bench and Bar.

The remark of Mr. Oswald, in his interesting work on "Contempt of Court," that good feeling nearly always existed between bench and bar in England, and when it is interrupted, the reason for it may generally be found to exist on both sides, is pretty nearly correct. He finds scarcely a case on record in the Superior Courts of a conflict between the bench and the bar becoming so acute as to lead to the committal of an advocate for contempt, while conducting his client's cause. Even Chief Justice Jeffreys, who is said to have on more than one occasion browbeaten and threatened counsel, does not appear to have put in force the power of committal against counsel. "The natural disinclination of the court to interfere with counsel in such a way as to take his services from his client," Mr. Oswald well remarks, "ought to from a strong reason for counsel not assuming too great a license." The London Law Times concludes that it would be difficult to find a clear case of a barrister being punished for contempt while actually pleading for his client in Court.

There are some historic precedents of impassioned dialogue between the representatives of the two orders. To begin with, there is the classic story of Wedderburn in 1757. Lockhart, being against him in the Inner House at Edinburg, showed "even more than his wonted rudeness and superciliousness," and called him "a presumptuous boy." "When," says Campbell (Life of Lord Loughborough in the Chancellors, vol. 6, p. 47), "the presumptuous boy came to reply, he delivered such a furious personal invective as never was before or since heard at the Scottish bar." Wedderburn's language, reported by Campbell, was an

outrage on decency. "Lord President Craigie, being afterwards asked why he had not sooner interfered, answered; 'Because Wedderburn made all the flesh creep on my bones.' But at last his lordship declared in a firm tone that 'this was language unbecoming an advocate and unbecoming a gentleman.' Wedderburn, now in a state of such excitement as to have lost all sense of decorum and propriety, exclaimed that 'his lordship had said as a judge what he could not justify as a gentleman.' The president appealed to his brethren as to what was fit to be done, unanimously resolved that Mr. Wedderburn should retract his words and make an humble apology, on pain of deprivation. All of a sudden, Wedderburn seemed to have subdued his passion, and put on an air of deliberate coolness, when instead of the expected retractation and apology, he stripped off his gown, and holding it in his hands before the judges, he said: 'My Lords; I neither retract nor apologize, but I will save you the trouble of deprivation. There is my gown, and I will never wear it more—*virtute me involvo.*' He then coolly laid his gown upon the bar, made a low bow to the judges, and before they had recovered from their amazement, he left the court, which he never again entered."

Another Scotchman, who also rose to be Lord Chancellor of England, played a nobler part in his contention with the bench. In 1784 the Dean of St. Asaph was indicted at Shrewsbury for seditious libel, and he was defended by Thomas Erskine. The jury found him "guilty of publishing only." Buller, J.; "If you find him guilty of publishing you must not say the word 'only.'"—Erskine; "By that they mean to find there was no sedition."—Juror; We only find him guilty of publishing. We do not find anything else."—E.: "I beg your lordship's pardon, and with great submission. I am sure I mean nothing that is irregular. I understand they say, 'We only find him guilty of publishing.'"—Juror: "Certainly, that is all we do find."—B.: "If you only attend to what is said, there is no question or doubt."—E.: "Gentlemen, I desire to know whether you mean the word 'only' to stand in your verdict."—Jurymen: "Certainly."—B.: "Gentlemen, if you add the word 'only' it will be negativing the innuendoes."—E.; "I desire to know your lordship, sitting here as judge, to record verdict as given by the jury."—B.; "You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment."—Juror: "Certainly."—E.: "Is the word 'only' to stand part of the verdict?"—Juror: "Certainly."—E.: "Then I insist it shall be recorded."—B.: "Then the verdict must be misunderstood; let me understand the jury."—E.: "The jury do understand their verdict."—B.: "Sir, I will not be interrupted."—E.: "I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded."—B.: "Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner."—E.: "Your lordship may proceed in what manner

you think fit; I know my duty as well as your lordship knows yours. I shall not alter my conduct.

The verdict was finally entered, "Guilty of publishing, but whether a libel or not we do not find."

Valuable as this precedent is, the comment of Campbell, himself a Judge and Lord Chancellor, is equally precious: "The learned judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. The noble stand for the independence of the bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanor during the struggle no less than its spirit, and the felicitous precision with which he meted out the requisite and justifiable portion of defiance. The example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England."

Another hot forensic *mélée* is recorded about 1817 (2 Law and Lawyers, 357). Sergeant Taddy was examining a witness in the Common Pleas, and spoke of the plaintiff "disappearing" from that neighbourhood. Park, J.; "That's a very improper question, and ought not to have been asked."—T.; "That is an imputation to which I will not submit. I am incapable of putting an improper question to a witness."—P. (angrily); "What imputation, sir? I desire that you will not charge me with casting imputations. I say that the question was not properly put, for the expression 'disappear' means 'to leave clandestinely.'"—T.; "I say that it means no such thing."—P.; "I hope that I have some understanding left, and, as far as that goes, the word certainly bore that interpretation, and therefore was improper."—T.; "I never will submit to a rebuke of this kind."—P.; "That is a very improper manner, sir, for a counsel to address the court in."—T.; "And that is a very improper manner for a judge to address a counsel in."—P. (rising, very warmly): "I protest, sir. You will compel me to do what is disagreeable to me."—T.; "Do what you like, my lord."—P. (sitting down): "Well, I hope I shall manifest the indulgence of a Christian judge."—T.: "You may exercise your indulgence or your power in any way your lordship's discretion may suggest, and it is a matter of perfect indifference to me."—P.: "I have the functions of a judge to discharge, and in doing so I must not be reproved in this sort of way."—T.; "And I have a duty to discharge as counsel which I shall discharge as I think proper, without submitting to a rebuke from any quarter." Sergeant Lens was about to interfere. Taddy protested against any interference, but Lens said: "My brother Taddy, my lord has been betrayed into some warmth——" "I protest," said Taddy; "I am quite prepared to answer for my own conduct."—P.: "My brother Lens, sir, has a right to be heard.—T.: "Not on my account; I am fully capable of answering

for myself."—P.: "Has he not a right to possess the court on any subject he pleases?"—T.: "Not while I am in possession of it, and am examining a witness." Mr. Justice Park, then seeing evidently that the altercation could not be advisably prolonged, threw himself back into his chair, and was silent.

Lord Brougham mentions a strange scene of which he was a witness, amusing rather than of good example. At Durham (about 1810 ?) a cause was being tried before Baron Wood. "There was heard an undergrowl on the other side from the Sergeant (Cockell), abusing Topping for his insolence and ingratitude, and the Baron for his ignorance and partiality, and calling for his clerk to bring him some of the stomach tincture, which we knew would console him, as it was generally brandy with some water added, to give it a name rather than materially alter its nature." (Works, vol. 4, p. 384.)

Something has been said about Kenealy's case above. As a matter of fact, his utterances in court never formed the subject of inquiry by any professional tribunal, but the important point to notice is that it was his inn, Gray's, which set the Lord Chancellor in motion (on account of his editorship of the Englishman) with the result that he was dispatented, and which disbenched and disbarred him on the same ground.

It will be clear from all the instances that no formula can exactly define to what length of retort or of freedom of speech in addressing a judge counsel may with propriety go. Obviously, a genuine instinct of self-respect will inspire an advocate with the exact measure of what is due to himself, and what is due to his professional superior, just as it will antagonists in any other controversy.

Perhaps the true "rule" may be collected from a dictum attributed to Curran *arguendo.* He offended Judge Robinson, who exclaimed furiously, "Sir, you are forgetting the respect that you owe to the dignity of the judicial character." "Dignity! my lord," said Curran, "upon that point I shall cite you a case from a book of some authority, with which you are perhaps not unacquainted. A poor Scotchman, upon his arrival in London, thinking himself insulted by a stranger, and imagining that he was the stronger man, resolved to resent the affront, and taking off his coat, delivered it to a bystander to hold, but having lost the battle, he turned to resume his garment, when he discovered that he had unfortunately lost that also—that the trustee of his habiliments had decamped during the affray. So, my lord, when the person who is invested with the dignity of the judgment-seat lays it aside for a moment to enter into a disgraceful personal contest, it is vain, when he has been worsted in the encounter, that he seeks to resume it—it is in vain that he endeavors to shelter himself behind an authority which he has abandoned." Robinson exclaimed: "If you say another word, sir, I'll commit you."—"Then, my Lord, it will be the best thing you'll have

committed this year." The judge did not do as he threatened, any more than was done in any of the cases already mentioned, or, indeed, in any recorded; but it is instructive to read that "he applied to his brethren to unfrock the daring advocate," but they refused. The true principle may be deduced from Curran's apologue. So long as a judge speaks in that capacity, be he right or wrong, he is entitled to all respect of demeanor and all courtesy of language. The moment he descends to personalities, invective or criticism not warranted or required by his duty to the court, that is, to the public, he strips himself of his judicial function, and the person aggrieved by his language is entitled to speak to him as man to man, a relation which of course still includes that of gentleman to gentleman.—*The Albany Law Journal.*

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Is the fact that the insured while insane burnt a building a defense to an action on a fire insurance policy.

The question whether it is a defense to an action on a fire insurance policy to allege and prove that the building was burned by the insured while insane, was recently decided in Pennsylvania, in Showalter, *Committee af Eaby* v. *Mutual Insurance Co. of Chester County.* The Superior Court, *Rice*, P. J., held that while the direct burning of the building by the wilful act of the insured was not one of the risks within the contemplation of the parties to the contract, it is equally well settled that mere carelessness and negligence of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy, unless specially excepted. It must not be assumed that what would be a fraudulent act if committed by a sane person is so in a person incapable of fraudulent intent, and of resisting insane impulse. The court adds: "When an insane person burns his own building, what legal wrong does he commit? Certainly none for which he is punishable criminally, and none for which he is responsible civilly, unless it be a breach of duty arising out of a contract. But as well might you say that negligence of the insured is a breach of duty owed to the insurer, as that an insane act is. No rule or principle of public policy forbids one to covenant for indemnity against loss by fire consequent upon either; and why a condition should be implied excepting one, and not the other, from risk, is not plain. The general rule is that a fire policy covers all risks of loss or damage by fire, save only such as are excepted by the terms of the policy, and such as are caused by the voluntary act, assent, procurement or design of the assured himself. In this respect the law of fire insurance seems to be in harmony with the law of life insurance. * * * As in life insurance, if not expressly provided otherwise, the policy covers death by suicide when insane, so also for similar reasons loss by fire occasioned by the negligent or insane act of the insured is one of the risks assumed, unless expressly excepted." The court points out that the act of burning

one's own property does not necessarily injure an insurance company. Whether it does or not depends upon whether the company has, for the time being, assumed the risk of such burning.

In another case the same court lays down the doctrine that a lunatic is civilly liable for loss occasioned by his perpetration of what in a sane person would be a tort or trespass in which wrongful or malicious intent is not an essential element. Accordingly, it was held that where a lunatic intentionally sets fire to the property of another, which is insured, the insurer having paid the loss, may recover the amount of the same from the lunatic. The learned judge, in closing his opinion, says:

"We have not undertaken to cite all the cases bearing upon the question, but, after a somewhat thorough research, we have been able to find no case in which it has been held that the lunacy of the defendant is a defence to an action for the recovery of compensatory damages for a tort in which wrongful or malicious intent is not an essential element. It has been asserted that the rule is, at least in this country, a universal one, that no one can be made liable for injuries to the person or property of another, without some fault or negligence on his part. It is undoubtedly true that the tendency of modern decisions is in that direction, but it is unsafe to say that the rule has no exceptions nor limitations. There are many injuries to which, upon sound principles of public policy, the rule is applicable, that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. Belonging to these classes is the injury to the person or property of another by an insane person, by an act which in a sane person would be a trespass. To apply the last mentioned rule to such a case does not, in the slightest degree, imply punishment of a person who is incapable of wrongful intent; it simply gives compensation to him who has been damaged; it places the loss where the burden more justly belongs:—*The Albany Law Journal.*

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The Chief Justice.

Only seven men have filled the High Office in the United States.

The office of chief justice of the Supreme Court of the United States was established by the Constitution concurrently with the office of president, but while the presidency has been open to all native-born citizens above the age of 35, the office of chief justice of the Supreme Court, bestowed usually upon men of mature, if not advanced years, has been held in fact by seven persons only since the foundation of the government. There has been more than three times as many presidents, says the New York Sun.

John Jay, of New York, was the first chief justice of the Supreme Court. He was appointed by Washington, in 1789. Judge Jay was at

that time only 44 years of age. When he attained the age of 50 he resigned and retired to private life. He died thirty-four years later—in 1829. The second of the Supreme Court justices was John Ellsworth, of Connecticut. He was 54 years of age when appointed, and served until 1801, when he resigned, resignation from public office being somewhat more frequent at that time than now. His successor was John Marshall, of Virginia, who was 46 years of age when he assumed the post by appointment of President John Adams. He held it uninterruptedly for thirty-four years, until his death in 1835.

Andrew Jackson appointed his successor, Roger B. Taney, of Maryland, who held the office until his death, in 1864. Judge Taney was 59 years of age when appointed and 87 at the time of his death. No chief justice of the Supreme Court, perhaps, had more intricate questions to determine or to vote upon in that tribunal than did Judge Taney, and his tenure and that of Chief Justice Marshall stretch over nearly one-half of the history of the United States as a nation. Chief Justice Taney's successor was Salmon P. Chase, of Ohio, who had previously been secretary of the treasury, and was 56 years of age when appointed. He served for nine years, dying in 1873. Mr. Chase was himself a candidate for the presidency, and had hoped to defeat Mr. Lincoln for renomination and to succeed him, and later, in 1868, it is known that Mr. Chase was a candidate for the democratic nomination for the presidency, though he had been one of the founders of the Republican party. Chief Justice Chase was succeeded in 1873 by President Grant's appointment of another Ohio man, Morrison R. Waite, who was 57 years of age when appointed, and served until 1888, when he was succeeded by the present chief justice, Melville W. Fuller, appointed by President Cleveland. Mr. Fuller is a native of Maine. He was, when appointed, 55 years of age, and was 64 on February 11, 1897. He is the seventh of the chief justices of the Supreme Court, and has served thus far a briefer term than any of his predecessors since Chief Justice Ellsworth:—*The Albany Law Journal.*

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A Retiring Executioner:—An event of national importance will shortly take place in France. It is the retirement of M. Diebler, the executioner, who, now that he has guillotined 502 criminals, thinks it high time his successor was appointed. He is 63 years of age, and has been forty years in his country's service. He served his apprenticeship with Roch, his predecessor, assisting in eighty-two executions.—*London Globe.*

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A Mixed Jury:—The jury in a divorce case in South Dakota was composed of six men and six women;—*The Albany Law Journal.*

The Madras Law Journal.

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EXTENT OF THE GRANDSON'S LIABILITY UNDER HINDU LAW TO PAY HIS GRANDFATHER'S DEBTS.

We propose to discuss in this article the question of the liability of the grandson under the Hindu Law to pay the debts, with interest thereon, of his paternal grandfather.

Whether the liability of the son and the grandson to discharge the debts of the father and the grandfather, respectively, is a purely personal one altogether independent of the question of assets inherited, or whether they are liable only to the extent of assets received, has now been set at rest. Whatever doubts there might once have existed on this point, it has now been settled by a long course of decisions in all the various Presidencies and by the judgments of their Lordships of the Privy Council that the sons and the grandsons are liable to pay the debts of the father and the grandfather only to the extent of assets in their hands or assets received and not accounted for by them. It is, therefore, of little practical interest at this date to discuss the texts of the ancient Smritis bearing on the subject. But the extent of the liability of the grandson for the debts contracted by his paternal grandfather has never yet, except in a solitary instance to which we shall refer later on, been litigated in any Indian Court, and as Indian Courts have to administer the Hindu Law contained in the Smritis in all questions relating to marriage, inheritance, etc., where special legislation or modern case-law has not modified or overruled the views of the ancient Hindu Law-books and as the law of debts has been treated of by all jurists on Hindu Law as intimately connected with, and auxiliary to, the law of inheritance, the question of the *extent* as distinguished from the *nature* of the grandson's liability to his paternal grandfather's debts has still to be considered an

open question to be decided on a correct construction of the provisions of the Smritis on the subject. The liability of the grandson to pay his grandfather's debts with interest has, therefore, to be decided by a consideration of the following points: *i.e.*, (1) Whether under the general rules of Hindu Law on the subject of *Interest on Loans* the grandson is entitled to claim immunity from the payment of the whole or any portion of the interest; (2) whether under any special provision of the Hindu Law the grandson is made liable only to pay the principal of the debt contracted by his grandfather; and (3) whether in either case the immunity or liability is affected by the nature of the loan, *i.e.*, whether secured or unsecured. We shall now proceed to discuss these questions in their order.

Before proceeding at once to do so, we shall first take a glance at the state of the case-law on these points to see if we are justified in discussing these questions at some length. In the first of the two reported cases on the point, *Narasimharav Krishnarav* v. *Antaji Virupaksh* (2 B. H. C. R., 64), the defendant, the grandson of the original debtor, was sued by the plaintiff for principal and interest due. The Bombay High Court, which, as the law then stood in the Presidency, held that the grandson was liable personally to pay the debt of the grandfather independently of the question of assets received, decreed that the grandson was bound to pay only the principal. This ruling which gives absolutely no reasons as observed by the Full Bench of the Allahabad High Court in *Luchman Das* v. *Khunnu Lal* (I. L. R., 19 A., 30,) decided the question in the light of the provisions of Bombay Act VII of 1866, enacted to secure uniformity in all the Presidencies in the matter of the liability of the sons and grandsons to the debts of the father and the grandfather, respectively.

In *Luchman Das* v. *Khunnu Lal, supra,* the plaintiff claimed from the defendant the principal and interest due under a mortgage-deed executed by the defendant's grandfather. The defendant, who had inherited the mortgaged property and was in possession of it, contended that under the Hindu Law the property in his hands was liable only to the extent of the principal secured by the mortgage. Their Lordships (with the exception of *Knox*, J., who supplemented the judgment of his colleagues with a few

observations to which we shall refer later on) in holding the defendant's contention untenable relied upon a number of authorities in support of their view, *i.e.*, *Nanomi Babuasin* v. *Maddan Mohun* (I. L. R., 13 C., 21), *Hanoomañ Persaud Panday* v. *Mussamat Babooee Munraj Koonweree* (6 M. I. A., 421), and *Girdharee Lal* v. *Kantoo Lal* (L.R., I.A. 321). These decisions, entitled to the highest weight as emanating from the Privy Council, decide the nature of the son's and grandson's liability to the father's and the grandfather's debts respectively, and define the remedies available to the creditors in recovering the debt due to them from the son and the grandson of their original debtors. They do not, as is conceded by their Lordships of the Full Bench, pronounce one way or the other on the *extent* of the liability of the son and the grandson to pay the debt of the father and the grandfather respectively. In fact the points at issue in the several cases cited clearly show that this question did not receive any consideration at their Lordships' hands. All that was decided in those cases and a host of others which followed them was that the creditor was entitled to all the remedies against the sons and the grandsons of the debtor which he could have enforced against the debtor himself. The extent of the liability was a question that never arose in those cases, and it cannot be argued that the word *remedies* which has acquired a technical signification in which it is apparently used in all these decisions, was intended to include what, in legal parlance, is expressed by the phrase—*the extent of the liability.* Their Lordships indeed anticipated this objection and therefore rested their judgment upon the inference that because the creditor had the same remedies against the debtor's sons and grandsons as against himself, the creditor could also recover the whole amount of the debt from them. This reasoning from the sameness of the remedies to the sameness of the extent of the obligation, to our mind, appears questionable.

Again, supposing that the learned Judges were right in holding that the grandson was bound to pay the whole amount that could have been recovered from the original debtor (his grandfather), we still respectfully submit that their Lordships failed to discuss the question whether the debtor himself was always bound to pay the principal and all the interest due, and whether the debtor himself

could not claim the benefit of the rule of Damdupat; for if the debtor himself could contest his liability to pay interest in excess of the amount of the principal, his sons and grandsons could undoubtedly do so *a fortiori*.*

The authorities quoted below strongly tend to show that the rule of Damdupat does apply to the case.

On the rate and amount of interest, Manu says: "A lender of money may take in addition to his capital the interest allowed by Vasishtha, *i.e.*, an eightieth part of a hundred, or one-and-a-quarter by the month if he have a pledge" (141). "Interest on money received at once must never be more than enough to double the debt (that is more than the amount of the principal paid at the same time)" (151). "On grain, on fruit, on wool or hair, on beasts of burden, it must not be more than enough to make the debt gain quintuple" (152). Manu, Chap. VIII. Gautama says: "The legal interest on money lent is at the rate of five mashas a month for twenty Kârshâpanas. Some declare that this rate should not be paid longer than a year. If the loan remains outstanding for a long time the principal may be doubled after which interest ceases. The interest on products of animals, on wool, on the produce of a field and on beasts of burden shall not increase more than the fivefold value of the object lent" (Gautama, Chap. XII, 29, 30, 31 and 36). Vishnu says: "On gold the interest shall rise no higher than to make the debt double; on grain, threefold; on cloth, fourfold; on liquid, eightfold; on substances from which spirituous liquor is extracted, on cotton, thread, leather, weapons, bricks and charcoal, the interest is unlimited; on such objects as have not been mentioned it may be double." (Vishnu, Chap. VI, 11—14, 16 and 17). Brihaspati says: "On gold, the interest may make the debt double; on clothes, and base metals, treble; on grain it is allowed to rise to four times the original amount, and so, on edible plants, beasts of burden and wool. It is allowed to make the debt gain triple on pot-herbs, sextuple on seeds and sugarcane and octuple on salt, oil and spirituous liquors. Likewise on sugar and honey, if the loan be of old standing." (Brihaspati, Chap. XIII, 14 and 15). Yâjnavalkya says: "If there be a pledge, the interest shall be an eightieth part by the month; or it may be two, three, four and five in the hundred according to the order of the castes. Those who go to forest shall pay ten in the hundred, and those who go to sea twenty in the hundred, or all in any caste shall pay the interest stipulated by them. The increase on female beasts lent is their progeny; on fluid, their eightfold; on cloth, corn and gold, their fourfold, threefold and twofold, respectively,"

(Yājnavalkya, Chap. II, 37 and 39). Kātyāyana says: "For gems, pearls, and coral, for gold and silver, for cloth made of cotton—the produce of fruit, or made of silk—the produce of insects, or made of wool—the produce of sheep, the interest stops when it doubles the debt. For all sorts of oil and spirituous liquors, for measures of clarified butter, for molasses and salt, the interest is held legal, though with the principal the debts be made octuple" (Colo. Dig., Vol. I, Bk, 1, Chap. 2, LX and LXVIII). Vasishtha says: "Gold, silver and gems may be doubled; grain, trebled; fluids are under the same law with grain; and so, rare flowers, roots and fruits; what is sold by weight, except gold and the like, may make the debt eightfold" (Vasishtha, Chap. II, 44—47). These texts are the most authoritative provisions in Smritis bearing on the subject of the *limits of interest.* There, thus, appears to be no conflict of authorities—a notable feature considering the number of authors—on the maximum amount of interest that could be recovered on money lent. Another important point on which these authorities are unanimously clear is that while the maximum amount of interest is seen to vary with the objects lent, it is altogether independent of the kind of loan, *i.e.*, whether it is a simple loan or a hypothecation or a mortgage. While the *rates* of interest are allowed to vary with the caste of the debtor and his occupation and while the maximum amount of interest as determined by its proportion to the principal varies with the description of the object lent, neither the rate nor the maximum amount varies with the loans classified according to their *nature.* This is an argument by implication that the maximum amount of interest on money lent with or without a pledge, with or without sureties, etc., is the amount of the principal. But the Smritis also contain express provisions on this point.

Narada sub-divides the chapter on *Debts* into twenty-six topics and in treating of the sixth topic propounds his rules regarding the rate, and the maximum amount of interest on loans in general. This portion contains definitions of the different kinds of interest, and no class of loans is exempted from the operation of these provisions. In the eighth sub-division of the chapter he defines and distinguishes the different kinds of pledges and mortgages and says nothing of the rate or amount of interest in respect of them. This method of treatment clearly indicates that the general provisions regarding rates and amount of interest apply to cases of mortgages.

Brihaspati begins his chapter on 'The Law of Debt' with the verse "A creditor should never lend money without having first secured a pledge of adequate value or a deposit or a trustworthy surety; nor

without a bond written (by the debtor himself) or attested (by witnesses)." Here is an express warrant for saying that the provisions which follow apply to money lent on pledges. Again, the same author enumerates and defines six kinds of interest, to the last of which he gives the technical name of *Bhôgalâbha* or interest realized by enjoyment of the mortgaged house or produce of a field. (Brihaspati, Chap. XI, 5—8). Again, the same author in the portion of the chapter dealing with mortgages says: "Should the creditor actuated by avarice use a pledge before interest has ceased to accrue on the loan (on becoming equal to the principal), such use shall be stopped." . . . . "When the time for payment has passed and interest has ceased (on becoming equal to the principal), the creditor shall be owner of the pledge; but till ten days have elapsed, the debtor is entitled to redeem it" (Brihaspati, Chap. XI, 18 and 25). Manu also after laying down provisions regarding rates of interest and certain rights and liabilities arising from various kinds of pledges says: "In money transactions, interest paid at one time must never be more than enough to double the debt." (Manu, Chap. VIII, 151). Vishnu says: "The pledge must also be restored to the debtor when the interest has reached its maximum amount (on becoming equal to the principal) and has been paid." (Vishnu, Chap. VI, 7). Yājnavalkya begins his chapter on the "Law of Debt" with the verse, "An eightieth part shall be the interest by the month on a loan with a pledge. In other cases, *i.e.*, on loans without a pledge the interest shall be two, three, four or five in the hundred in the order of the different castes"; and after enumerating the circumstances under which higher rates of interest would be allowable says: "The highest accumulation of debt (principal and interest) is four times, three times and twice the principal on loans of clothes, grain and gold, respectively." (Yājnavalkya, Chap. II, 39). Yājnavalkya says: "Whenever a mortgage-debt becomes doubled by interest, then the pledge shall be returned whenever double the sum lent has been received." (Yājnavalkya, Chap. II, 64). It is thus clear that all Smritis of note expressly and by implication lay down that the highest amount of interest cannot exceed the principal, and that this rule of Damdupat applies as well to mortgages as to unsecured loans.

The case-law on the subject is also clearly in support of the applicability of the rule of Damdupat to cases of mortgages and pledges, ever since the decision of the Bombay High Court in *Nathubai* v. *Mulchand* (5 B. H. C. R., 196) which overruled a prior decision of the same High Court in *Narayan* v. *Gangaram*, (5 B. H. C. R., 157.) The overruling decision laid down that in all cases of mortgage where

no accounts of rents and profits accruing from the mortgaged property were to be taken, the rule of Damdupat was applicable and that where such accounts were to be taken the rule of Damdupat did not apply. This decision was followed in its entirety till *Telang*, J. in *Shai Ganesh Dharnidar* v. *Keshavrai* (I. L. R, 15 B., 625) pushed the principle of the decision in *Nathubai* v. *Mulchand* to its most legitimate consequences and ruled that the rule of Damdupat was alike applicable to cases of mortgage where at the final payment the interest exceeded the amount of the principal, though accounts of the rents and profits accruing from the mortgaged property were to be taken under the provisions of the deed of mortgage. He held that the effect of the decision in *Nathubai* v. *Mulchand* was only 'to prevent the rents and profits being deducted from the amount so doubled.' This decision of *Telang*, J., was, however, subsequently overruled by the Full Bench decision of the same Court in *Gopal Ramachandra Limaye* v. *Gangaram Anand Shet*, I. L. R., 20 B., 721. For the purpose of this article it is immaterial to consider whether the decision of *Telang*, J., was rightly overruled by the subsequent Full Bench decision; for whether the former or the latter is the correct law, it is now settled that the rule of Damdupat applies to all loans and that mortgage-debts *as mortgage-debts* are not exempted from the operation of the rule, the conflict of decisions turning upon the provisions of the mortgage instrument and not upon the fact of the debt being a mortgage-debt.

But apart from the rule of damdupat let us consider whether the grandson, as such, could under any special provisions of Hindu Law claim immunity from payment of all interest due on the grandfather's debt.

Now on the subject of the grandson's liability to pay the grandfather's debt, Yājnavalkya says: "The father being absent in a foreign country or deceased or wholly lost in vice, the sons or their sons must pay the debt; but if disputed, it must be proved by witnesses" (Yājnavalkya, Chap. II, 50). Vishnu says: "If the debtor die, become a sanyasin, or remain in a foreign country for twenty years, the debt shall be discharged by his sons or grandsons, but not by remoter descendants against their will." (Vishnu, Chap. VI, 27). Brihaspati says: "The father's debt must be paid first and next a man's own debts; but, even before these two the paternal grandfather's debt must be paid" (Brihaspati, Chap. XI, 48). Nārada says: "The father being dead, the sons, whether after or before partition, shall discharge his debts according to their

shares, or that son alone shall pay who manages the family estate. The debt of the grandfather inherited by the sons and left unpaid by them should be discharged by the grandson. The liability for it does not affect the fourth in descent" (Narada, Chap. I, 2 and 4). Kātyāyana says, "The father being dead, the debts of the grandfather should be carefully discharged by the grandsons." (Cole. Dig., Vol. I, 208, cxcviii). Side by side with these and other texts which cast upon the grandson the liability to pay the grandfather's debt, the following texts limit such liability to the amount of the principal debt:—"The father's debt when proved must be discharged by the sons as if it were their own, the grandfather's debt must be paid by the grandsons *without interest*; but the son of a grandson need not pay it at all." (Brihaspati, Chap. XI, 49). "Bhrigu declares that the grandfather's debt proved and admitted by the father must be discharged by his grandsons, if not contracted for immoral purposes, or already paid by the sons. The same rule applies to the debts of the grandfather not discharged by other grandsons or his own sons; but a debt of the grandfather shall be paid by his grandsons *without interest*" (Cole. Dig., Vol. I, 207, cxcvii). It is unnecessary to observe that, according to the rules of interpretation applicable to Hindu Law, the liability imposed upon the grandson by the former set of texts is limited by the latter, especially when we consider that the authors of the latter are both among the authors of the former. It should also be noted that this limitation of the grandson's liability is recognized by the author of the Vyavāhāra Mayukha and the author of the Mitakshara (Mandlik's Translation of Vya. Mayu., page 113, and Vijnanesvara's commentary on Yājnavalkya, Chap. II. 50). The observation of their Lordships, therefore at page 30 I. L. R., 19, A. that the texts of Vishnu and Yājnavalkya do not place any such limit on the extent of a grandson's liability, but treat the liability of the son and the grandson to discharge the debt of their ancestor as co-extensive, is unsupportable, not only on a consideration of other texts, but also in the light of Vijnānesvara's commentary upon the text of Yājnavalkya above quoted. The Full Bench decision in *Luchman Das* v. *Khunnu Lal* can hardly be supported therefore upon this line of reasoning adopted by their Lordships. There, however, remains to be considered the one argument by which *Knox* J., in the above case supplements the arguments of his colleagues,

Regarding the text of Brihaspati on which the respondents in *Luchman Das* v. *Khunnu Lal* relied as limiting the grandson's liability to the principal only of the grandfather's debt, *Knox* J., observes : " A closer examination, however, of the passage quoted from Brihaspati shows that the contention rests upon insufficient grounds. Brihaspati divides the chapter in which he deals with debt into three portions. The first portion (slokas 1—38) deals with money lent on the security of pledges or deposits; the second (slokas 39—53) is devoted to money lent upon trustworthy sureties. The remainder of the chapter is taken up with recovery of money lent. If the case before us falls under any portion of the chapter, it would fall under the first portion——. . . . . . The sloka upon which the learned counsel for the respondents relies is one which deals with debts not secured, and in the absence of any contrary expressions it must and should be held to have reference to that class of debts alone." (I. L. R., 19 A., 34). In the first place the chapter on debt is not divided as indicated by his Lordship. Slokas 1—16 define the various rates of legal interest and limit the maximum amount of interest recoverable on loans with reference to the objects lent. Slokas 17—38 are taken up with defining various kinds of pledges, the consequences of loss or deterioration by use of objects pledged, the rights and liabilities of successive mortgagees of the same property, etc. Slokas 39—46 speak of the various kinds of sureties, of their order, and of the circumstances under which they become liable to pay the debt and of the difference in the extent of the obligations arising from the different kinds of suretyship. The rest of the chapter treats of the liability of the son and the grandson of the debtor, of the successor to the estate of the deceased, etc. Now the word 'loan' in sloka 46 is a general term and comprehends both secured and unsecured debts, and money lent upon a pledge or trustworthy surety is as much a loan as a simple loan. Speaking of money lent on a pledge (which according to sloka 17 may be either movable or immovable) the author in sloka 18 says : " Should the creditor actuated by avarice use a pledge before interest has ceased to accrue on the loan," where clearly the word *loan* denotes a mortgage-debt. Again, whether the debt be secured or unsecured, the words *loan, creditor,* and *debtor* are used indifferently in respect of both kinds of debt, and the terms mortgage debt, mortgagee and mortgagor are not used to distinguish secured debts from unsecured debts. (*Vide* Slokas 18, 21, 22, 25, 32).

Again, if *Knox*, J., were right in his view of the bearing of the text relied on by the counsel for the grandson, startling anomalies would have to be subscribed to. If the portion beginning from sloka 46 and ending with the chapter related only to unsecured debts, it would then follow that a mortgagee cannot pursue the debtors or his sons or grandsons or heirs for the recovery of the mortgage debt. It may be said that he could realize his debt by proceeding against the mortgaged property. This would be a hardship to the creditor, as such a course is only one of the remedies allowed him by law. But, supposing for a moment that there is not much harm in compelling the creditor to pursue that remedy and that remedy alone, what remedy has he in respect of any balance due to him under the mortgage left after debiting the whole proceeds of the sale of the mortgaged properties in reduction of his debt? He cannot proceed against the debtors' person or other properties in his hands or in the hands of his sons and grandsons or other heirs; for according to *Knox*, J., the liability cast upon these persons by the last portion of the chapter is in respect of unsecured debts alone. This legitimate consequence of the view of his Lordship is inconsistent with the spirit of Hindu Law and deprives the mortgagee of rights which have always been recognized by jurists and judicial tribunals. Again, the immunity of sons, grandsons and other heirs from the obligation to pay the ancestor's debts when contracted for immoral or illegal purposes is laid down in sloka 51 of the chapter, and if the view of *Knox*, J. were correct, the sons and grandsons of the mortgagor cannot impeach a mortgage created by their ancestor for illegal or immoral purposes—a result which is repugnant to the recognized principles of Hindu Law.

We are thus constrained to express our dissent from the reasoning employed and the conclusion arrived at by their Lordships in the matter of the grandson's liability to pay the interest on his grandfather's debt and to hold that the grandson is bound to pay his grandfather's debt only to the extent of the principal, and that if he were compellable to pay interest, he would be entitled to the benefit of the rule of Damdupat.

A PLEADER.

TRANSLATED FROM THE VIVADARATNAKARA.]

CHAPTER IV.

Partition Among Sons of The Same Father by Different Mothers.

On this subject, Manu says; "If there be a doubt as to how the division should be made in the case where the younger son is born of the senior wife and the elder son of the junior wife, there the son of the senior wife shall take as his additional share one bull, and the next best bulls shall form the portion of those who are inferior on account of their mothers." (1) *Commentary.*—The doubt herein expressed arises only in the case where the other sons are born of mothers equal in class with the son of the senior wife, as the mode of partition among brothers of different castes will be dealt with later on. The word '*Pūrvaja*' denotes the son, though younger born, of the wife first married. The meaning of the first portion of the last verse is, " all bulls next best to the one most excellent bull given to the younger son by the first wife." '*Inferior*' means 'born of mothers married after his own mother.' Having thus explained seniority with reference to the mothers, the author points out a further distinction in the same case. "But the eldest son born of the eldest wife shall take as his additional share sixteen with the bull and then the other sons may take shares according to the seniority of their mothers. This is the established rule." (2) *Commentary.*—The word '*Vrishabhá Shodasah*' means 'cows whose number makes sixteen with the one bull.' This deduction indicates the extreme equality in caste of this son. The rest owing to their mothers being juniors take each one bull next best. Prakāsakāra says that Manu is here stating the views of others as he has already declared his own view that seniority of sons depends upon the order of their births and not on the seniority of their mothers. Halāyudha, however, interprets these texts of Manu as follows:—" Where the younger son is born of the senior wife and the elder of the junior wife, there the elder son born of the junior wife shall take as his additional share one most excellent bull. The other bulls which are inferior to this shall be taken by the elder sons born of senior wives, one each according to the relative inferiority of their mothers. The rest shall be divided equally.

(1) Manu, Chap. IX, 122 & 123.

(2) Manu, Chap. IX, 124.

But where the eldest son is born of the senior wife, there Manu points out a special distinction in verse 124. He shall take fifteen cows and one bull as his additional share. The other sons shall, according to the rank of their mothers, each take, as previously mentioned, one bull."

On this point, Gautama says: "The additional share of the eldest is one bull; but if born of the first wife, he shall take fifteen cows and one bull, or let the eldest son share equally with the younger born of the first wife." (1) *Commentary.*—The term '*eldest*' means 'the elder son of the junior wife according to Manu.' The word *Jyeshtinēyah* means the eldest son born of the senior wife. The word *Samadhá* means 'equally.' This rule applies where all the sons are of equal class.

Sankha and Likhita say: "One bull to the eldest as his additional share and the house to the younger." (2) *Commentary*—Here also the word '*eldest*' means the elder son born of the junior wife according to Manu.

Gautama says: "Let the special shares be adjusted among each class of sons according to their mothers." (3) *Commentary*—The meaning of this is as follows: Where there are several wives of the same class and where each has several sons equal in number, then, as this special rule of division is not easily workable, the estate should be divided according to the mothers and the special rule of deduction of one-twentieth share, etc., should be applied among sons by the same mother.

Brihaspati says: "Where there are many sons sprung from the same father, born of different mothers, equal in caste and number, division should be legally made into shares according to the mothers. But where equal in caste but varying in number, then the division should be according to males." (4)

Vishnu says: "Sons who are equal in caste shall take equal shares. The best part shall be given to the eldest as his additional

(1) Gautama, Chap. XXVIII, 14, 15 & 16.
(2) Cole. Dig., Vol. II, 216, XLIII.
(3) Gautama, Chap. XXVIII, 17.
(4) Brihaspati, Chap. XXV, 15 & 16.

share." (1) *Commentary*—This rule applies where the number of sons by different mothers varies.

Manu says : "But there is not this deduction of the one out of ten among brothers equally zealous in their duties; some trifle only need be given to the eldest just to promote the feeling of respect." (2) *Commentary*—The meaning of this text is this:—When the brothers are equally skilled in the recitation of the Vedas, etc., the deduction of one best among ten should not be allowed. This deduction of one best among ten is here used as an indicative illustration. All kinds of deductions are hereby countermanded, because it is said 'some trifle need only be given.' However, something to show respect for the mere fact of the seniority of birth should be given. But where there is a difference between the sons in respect of the possession of good qualities also, Manu states the opinion of others in his verses already cited and not concurring in their view, he enunciates his own view in the verse 'among brothers born of wives of equal class, etc.' As otherwise there would be a contradiction, the other rule has been overruled. As the special rule applies where there is a difference in good qualities and behaviour, it is only fair that the other view should be overruled when his own view has to be enunciated as the conclusive one. Lukshmīdhara holds that the younger son born of the senior wife is alone entitled to the deduction on account of seniority and Pārijāta also concurs in this view. Manu says: "Even in Swabrahmanyâs, invocation is made according to seniority of birth. Seniority among twins conceived at the same time is also considered to depend on seniority of actual birth." (3) *Commentary*—Swabrahmanyâs is the name of a particular mantra recited by Chandogyas during Jyotishthoma sacrifice. The plural number is used, because it is often repeated. There the father is invoked as the father of his eldest son; *e.g.*, " the father of Amuka, the grandfather of Amuka is performing the sacrifice." The Natasutra says that seniority by birth is thereby indicated as also from the text 'the eldest of such of the male and female issue as are alive.'

Devala says : "Seniority is determined among brothers beyond the pale of castes by behaviour, and among twins, by priority of

(1) Vishnu, Chap. XVIII, 36 & 37.
(2) Manu, Chap. IX, 115.
(3) Manu, Chap. IX, 126.

actual birth. Of brothers born twins, he whose face is first seen by the parents is established to be the elder." (1)

Manu says: "The eldest brother who out of avarice deceives his younger brothers ceases to be the eldest. He shall have no share and shall be chastised by kings." (2) *Commentary*—The word '*vinikurvêta*' means 'should deceive.' 'Ceases to be the eldest' means 'becomes unworthy of being respected like the eldest.'

Accordingly, Manu says: "Where these deductions are made, the shares should be made equal; but if no such deductions are made, the allotment of shares shall be made in the following manner:—The eldest shall take one share in excess, the next younger shall take a share and a half, the rest one share each. Thus has the law been settled." (3) *Commentary*—'One share in excess' means 'two shares.' The next younger shall take a share and half a share more. The rest shall take each a share. This rule applies where division is made without making a deduction. This rule again applies only where the eldest brother and the next younger to him are possessed of excellent qualities and learning and the rest have no good qualities, agreeably to the text of Brihaspati regarding the eldest son. 'The brother eldest by birth, good qualities and learning shall take two shares of the heritage, and as the same reasoning applies to the one next younger to him, it must be understood that the deduction of a twentieth share, etc., obtains where all the brothers possess good qualities and good behaviour; but where there is some difference of degree in the possession of these, Gautama says: " Or let the eldest have two shares and the rest one each." (4) *Commentary*—This rule applies where the eldest alone excels in good qualities and the rest are devoid of any. Accordingly, Gautama says: " Or let them each take one kind of property, (selecting) according to seniority what they wish for; 10 head of cattle." (5) *Commentary*—The meaning is that they shall take ten cattle each of the same class, in the order of seniority.

Gautama adds: " But none shall take ten one-hoofed beasts or slaves." (6) *Commentary*—The meaning is that none shall take ten

(1) Cole. Dig., Vol. II, 231, LXV.
(2) Manu, Chap. IX, 213.
(3) Manu, Chap. IX, 116 & 117
(4) Gautama, Chap. XXVIII, 9 & 10.
(5) Gautama, Chap. XXVIII, 11 & 12.
(6) Gautama, Chap. XXVIII, 13.

of one-hoofed animals like horses, or of bipeds such as slaves, etc. This rule applies where all are equal and there are many animals to divide.

Vasishtha says: "Now, partition of the estate among brothers. Let the eldest take a double share and one out of ten kine and horses. The goats and the house belong to the youngest; black iron, utensils and furniture to the middlemost." (1) *Commentary*—The meaning is, the eldest shall take two shares and one most excellent of every 10 cows and horses. This text of Vasishtha applies where the eldest excels in good qualities and the other two are also possessed of good qualities.

Narada says: "A larger share shall be given to the eldest son and a smaller to the youngest; the rest shall take equal shares, and so an unmarried sister. This rule also applies to *Kshetraja* sons lawfully begotten upon the wife." (2) *Commentary*—Prakāsakāra, however, reads 'a large share to the best' instead of 'a smaller to the youngest' occurring in this verse. He comments upon his own reading and says that the first-born son takes two shares and the best, *i.e.*, the son who is engaged in the management of domestic concerns should be given something excellent. 'And so an unmarried sister' means that she shall also be entitled to a share. This is the mode of division among *aurasa* sons. The mode of division among *Kshetrajas* will be next explained. The mode of division pointed out among *aurasa* sons will also apply in the case of *Kshetrajas* where these *Kshetrajas* are lawfully begotten, *i.e.*, where they are begotten upon the soil lent by the impotent, etc., to his *Sakulya* or one of his own caste. Even among such *Kshetrajas* the larger share allowed to the eldest should be given. It may be asked how there can be many Kshetraja sons of one man? The answer is that the text applies to Kshetraja sons born twins.

As to the qualifications of the eldest son who is entitled to a larger share, Brihaspati says: "He who is the first by birth, learning and good qualities shall take two shares of the heritage; the rest share equally; for to them he is equal to a father" (3).

Usanah says: "The mode of division among *anuloma* castes has been declared. But the mode of division among brothers alike

(1) Vasishtha, Chap. XVII, 40, 42, 43, 44 & 45.
(2) Narada, Chap. XIII, 13 & 14.
(3) Brihaspati, Chap. XXV, 9.

born of the same father will be pointed out." (1) *Commentary*—Namely, among all sons equally devoid of good qualities; thus even where one is possessed of good qualities, if all acquire different kinds of property, then they shall divide equally. This is the meaning.

Yājnavalkya says: "Let the sons divide equally the wealth and the debts of their father after his death." (2) Also "But where the common wealth is improved by the efforts of one of the brothers, the law is that division should be equal; but among sons of different brothers the allotment of shares is according to the fathers." (3) *Commentary*—The first portion is an exception to the rule of Vasishtha that he who acquires property shall take two shares. When common property is considerably improved by one of the brothers by good husbandry, etc., then that property shall be equally divided and the person who improves shall not take two shares. This is the meaning. The rule of Vasishtha should be understood to apply to cases other than this. Where the property of the grandfather has to be divided among sons of different brothers, whether equal or unequal in number, they (together) take the share which their father would have taken. But each should not take a share.

On the same subject, Brihaspati says: "Whatever has been jointly acquired by all, they shall divide equally. Their sons, whether equal or unequal in number, are declared entitled to the shares of their father." (4) *Commentary*—Sons unequal or equal in number whose fathers had not divided are here meant.

Kātyāyana says: "Where the son dies undivided, his son that had received no means of livelihood from the grandfather should be made his heir. He shall receive his father's share from his paternal uncle or the son of the latter. The same share shall legally belong to all the brothers; or even his son shall receive it. It shall not lapse." (5) *Commentary*—Where among brothers one dies, then the share of his son shall not lapse.

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(1) Cole. Dig., Vol. II, 234, LXXII.
(2) Yājnavalkya, Chap. II, 117.
(3) Yājnavalkya, Chap. II, 120.
(4) Brihaspati, Chap. XXV, 14.
(5) Cole. Dig, Vol. II, 241, LXXIX.

Devala says: "Among co-parceners living together undivided or divided, there shall be a subsequent division of heritage extending to the fourth degree. This is settled."(1) *Commentary*—The meaning is this:—Among co-parceners, whether undivided or re-united after division, the subsequent partition extends only to the brothers, their sons and the sons of these. To the sons of the last mentioned the partition does not extend.

The same author says: "Men of the same *gotra* are *sapindas* only to that extent. After them there is a difference of *pinda*. Sages intend that partition of heritable property should be co-extensive with *sapinda* relationship."(2) *Commentary*—This applies also to the property of which one wishes for a partition when it is not enjoyed by him but is enjoyed by another living in the country in which the property is situate.

Vasishtha says: "Now, partition of estate among brothers. It shall be delayed till childless women bear sons."(3) *Commentary*—'Women' here means 'wives of brothers.' If they are supposed to be pregnant, shares should be given them also. If no son is born, brothers alone shall divide and the women should only be maintained.

Vishnu says: "Mothers shall take shares proportionate to their sons' shares and so shall unmarried daughters."(4) *Commentary*—From the use of the plural 'mothers,' as every one is a mother, and as there is no warrant for understanding it in the singular number, all mothers are entitled. Or it may mean that shares are reduced according to the descending order of the castes of their mothers agreeably to the text that mothers take shares proportionate to those of their sons. Where there is only one mother the whole text is easily understood. So says Grihēsvara also.

Yājnavalkya says: "Of brothers who divide after their father's death, even the mother takes an equal share."(5)

Brihaspati says: "In default of him (the father), the mother takes a share equal to that of a son. Their mothers take equal

(1) Cole. Dig., Vol. II, 242, LXXXI.
(2) Cole. Dig., Vol. II, 243, LXXXII.
(3) Vasishtha, Chap. XVII, 40 & 41.
(4) Vishnu, Chap. XVIII, 34 & 35.
(5) Yājnavalkya, Chap. II, 123.

shares and a maiden takes a fourth share"(1) *Commentary*—The word 'mother' first used, means 'the mother of living sons.' The word 'mothers' means 'wives of the father having no issue.' 'A fourth share' means 'a fourth of the share which a son of that class would be entitled to.' This must be given for the performance of sacraments. As for the text of Vishnu that the mothers take shares proportional to the shares of their sons, as also unmarried daughters, that rule also in the light of this text must be understood as allowing this one-fourth share, as this text also is intended to refer to unmarried daughters.

Vyāsa says: "All the sonless wives of the father are also declared entitled to take equal shares, and all paternal grandmothers are declared equal to mothers."(2)

Brihaspati says: "All sons shall share alike their father's wealth. But he who possesses learning and virtue deserves a larger share than the rest. Fathers are fathers by virtue of that son whose fame fills the world for learning, discernment, valour, knowledge, liberality and virtue."(3)

Nārada says: "He who, zealous about domestic concerns, looks after them shall be supported by his brothers, with food, raiment and vehicles."(4) *Commentary*—Halāyudha comments upon this text as meaning that where one of the brothers, owing to his own ability, does not take a share, partition should be made after giving him some trifle in order that his sons may not subsequently dispute; and in support of his construction of this text quotes by way of introduction the passage of Manu which says: "Where of brothers, one being able in his occupation does not wish for a share, he must be given some little portion for livelihood and separated from them."(5) Prakāsakāra on the other hand interprets the passage thus:—Where brothers living jointly and having paternal wealth earn more by their own husbandry, and where one of them earns nothing, he should not be given the increase proportionate to his share of the paternal wealth employed by them in trade; but

(1) Brihaspati, Chap. XXV, 64.
(2) Cole. Dig., Vol. II, 243, LXXXIV.
(3) Brihaspati, Chap. XXV, 10 & 11.
(4) Narada, Chap. XIII, 35.
(5) Manu, Chap. IX, 207.

there is no prohibition against his being given his share of the capital. Even then there shall not be a regular partition. He must be given something for his livelihood. After reserving to themselves a share for their own trouble, the residue alone shall be given him.

As a limitation to the alternatives propounded in the rule: "Let the eldest take a larger share, or let all the brothers share equally," Yājnavalkya says: "One able and not wishing for a share shall be given some trifle and separated."(1) *Commentary*—Here also Prakāsakāra says: "Something though trifling should be given him and he should be separated in order that his sons may not afterwards quarrel about it."

Thus ends the chapter on "Partition among brothers by different mothers."

CHAPTER V.

On persons excluded from inheritance.

On this subject, Āpastamba says: "All virtuous sons inherit. But let him be made portionless, though the eldest son, who spends money unrighteously."(2) *Commentary*—'Spends' here means 'wastes.' 'Unrighteously' means 'in gambling and like pursuits inconsistent with the order of his life.' 'Portionless' means 'deprived of his share to the extent of money wasted by him.' Some say that he should altogether be disinherited.

Gautama says: "Even the son born of a wife of equal caste, if addicted to vice, gets no share."(3) *Commentary*—The word 'even' shows that the rule applies with greater force to sons born of wives of different castes. So says Achārya. Prakāsakāra says that this text lays down an alternative in view to the fact that sons though so addicted to vice can be reclaimed from sinful ways.

On this subject, Manu says: "All brothers who are addicted to doing forbidden acts are unworthy of property."(4) *Commentary*

(1) Yājnavalkya, Chap. II, 116.
(2) Apastamba, P. II, P. 6, K. 14, 14 and 15.
(3) Gautama, Chap. XXVIII, 40.
(4) Manu, Chap. IX, 214.

—'To doing forbidden acts' means 'to gambling and the like.' Others say that this expression means 'to committing waste upon family property.'

Sankha and Likhita say: "He who has been formally degraded loses his rights to inherit and to offer oblations of food and libations of water."(1) *Commentary*—'Formally degraded' means 'expelled from caste after breaking the pot by relatives for treason and other heinous offences.'

Brihaspati says: "Though born of a wife of the same caste, a son devoid of good qualities does not deserve the paternal wealth. It is said to go to those learned men who offer rice balls to him. A son is he who redeems his father from debts superior and inferior. Therefore, there is no good having a son who is not of that description. What end can be served by a cow which yields no milk and is not pregnant? What purpose is served by a son who is neither learned nor virtuous? A son who is devoid of learning, valour, wealth, devotion, knowledge and virtuous conduct is equal to urine and excrements." (2) *Commentary*—'Devoid of good qualities' is explained by the author himself in the succeeding portion. The expression 'Tatpindadah' means 'those who give the son devoid of good qualities, food and raiment.'

Manu says: "Eunuchs and outcasts are not entitled to share; so also persons born blind or deaf, the insane, the idiot and the dumb as well as those who are wanting in one organ. But it is just that even to these food and raiment should be given without stint by the intelligent. Those that refuse to give will become degraded. If the eunuch and the rest somehow desire to marry, the offspring of such wives deserves a share."(3) *Commentary*—The term 'Jātyandha' denotes the incurability of the blindness and not its existence from birth. 'Idiot' means 'one who could not discern between himself and others.' By the term 'Nirindriya' are included the lame and the like who are incompetent to perform the duties enjoined by the Srutis and the Smritis. 'All these' means 'the impotent and the rest.' 'Without stint' means 'for

(1) Cole. Dig. Vol. II, 423, CCCXVIII.
(2) Brihaspati, Chap. XXV, 42—45.
(3) Manu, Chap. IX, 201—203.

life.' The term '*klībāthīnām*' means 'persons enumerated in the text, *klība* excluded; for an impotent man is incapable of procreating. Prakāsakarā, however, holds the opposite view. He says that the term *klība* means 'a person suffering from impotency due to causes which may subsequently be counteracted.' The word '*tantu*' means 'offspring.'

Yājnavalkya says: "The outcast, his son, the impotent, the lame, the insane, the idiot, the blind and others, such as persons suffering from incurable disease, take no shares but are entitled to be maintained."(1) *Commentary*—'His son' means 'the son born after he became an outcast.' 'Idiot is one whose mind is vacant.' "Incurable diseases," such as leprosy, etc., for which there is no remedy. The word '*Ādi*' includes all persons enumerated by other sages as entitled to no shares but only to maintenance.

Suspecting that the exclusion from inheritance of the impotent and the like may be argued to extend even to their sons, Yājnavalkya says: "The *aurasa* and the *kshetraja* sons of these, if themselves free from blame, share in the inheritance, and the daughters of these should be maintained so long as they are not provided with husbands."(2) The same author propounds the following rule with respect to the wives of the impotent, etc.:—"The sonless wives of these, if virtuous, should be maintained. But such of them as are unchaste or adverse to their husbands should be driven out."(3) *Commentary*—The term 'adverse' contemplates the doing of such acts as administering poison and not the sowing of family dissensions.

Narada says: "One hostile to his father, degraded, impotent or expelled from caste for heinous offences, shall not share in the inheritance, even if he be an *aurasa* son. How could he, if he were only a *Kshetraja*? Persons suffering from chronic or acute complaints, the idiot, the insane, the blind and the lame need only be maintained at the expense of the family; but their sons take their shares."(4) *Commentary*—He who hates his father is the enemy of his father. Such hatred terminates in compassing the death of the

(1) Yājnavalkya, Chap. II, 140.
(2) Yājnavalkya, Chap. II, 141.
(3) Yājnavalkya, Chap. II, 142.
(4) Narada, Chap. XIII, 21 & 22.

father who is alive and in refusing to offer for the benefit of his soul libations of water, etc., when he is dead.' 'One expelled from caste for heinous offences' means 'one who having been found guilty of regicide, etc., has been outcasted, the ceremony of breaking the pot having been performed.' Prakāsakāra, however, reads 'up papātaki' which means 'one guilty of minor offences.' 'Chronic diseases,' such as consumption, etc. 'Acute diseases,' such as leprosy, etc. 'The family' means 'brothers, etc.'

Devala says: 'When the father is dead, the impotent, the leper, the insane, the idiot, the blind, the outcast, his offspring and the heretic do not share in the inheritance. To these with the exception of the outcast, food and raiment should be given. Their sons if free from blame themselves shall take their fathers' shares."(1) *Commentary.*—'When the father is dead' means 'even though the father be dead.' The term '*Linghi*' (heretic) means 'one who greatly pretends to observe vows.'

Vishnu says: "Outcasts, eunuchs, persons afflicted with incurable diseases or deficient in organs do not receive shares. They should be maintained by those who take the inheritance. Their *aurasa* sons take shares, but not the sons of outcasts." (2) *Commentary*—The sons of the outcast born after the commission of the offence which entailed such degradation or begotten upon women of superior castes do not receive a share, not even in the wealth of their grandfathers. '*Riktagrahinah*' means 'of him who takes the share.'

Baudhayana says: "Those who are unable to manage their own business should be supported by giving food and raiment, such as the blind, the idiot, one immersed in vice, the diseased and those who have no duties to perform; but not the outcast or his offspring."(3) *Commentary*—'Those who have no duties to perform' means 'those who are not entitled to perform acts of virtue, sacrifice, etc.; for it is declared, "Wealth is created for sacrifice. Therefore it must be given to persons who are competent to perform virtuous acts and not to women, fools or vicious men." As all intercourse with the outcast and his offspring is prohibited, even maintenance shall be refused them.

(1) Cole. Dig., Vol. II, 426, CCCXXI.
(2) Vishnu, XV, 32, 33, 34 and 35.
(3) Baudhayana, II, 2, 3, 37-40.

Vasishtha says: "And those who have entered a different order do not share in the inheritance."(1) *Commentary*—'A different order' means 'any order other than that of a *grihasta* or a householder.'

Gautama says: "The idiot and the eunuch should however be supported; the male issue of an idiot deserves a share. Sons begotten on women of higher castes by men of lower castes should be regarded as sons of a Brahmin by a Sudra wife."(2) *Commentary.*—The word 'deserves' indicates that the son of the idiot will receive a share if he is entitled to it in his own right and not because of his being the son of the idiot. By the expression 'like the son by a Sudra wife' it is meant that the sons of a *Pratiloma* connection if doing service to the father should be maintained like the son of a Brahmin by a Sudra wife.

Kātyayana says: "The paternal wealth will not go to the son of a woman improperly married or born of a woman of the same *gōtra* or to one who having entered the religious order reverts to the householder's. The son of the woman married improperly if he be of the same caste with the father and the son of a wife of a different caste but properly married take the inheritance. The son of a woman begotten by a husband of inferior caste is not entitled to inherit. Food and raiment without stint should, it is considered, be given him by his relatives. In default of them, he may inherit the paternal wealth. But his relatives shall not be compelled to give him any wealth which is not his father's."(3) *Commentary*—'The son of a woman improperly married' means 'son of a woman not of the same caste with the husband and married in violation of the rules enjoined by the Shasters with regard to the marriage of maidens of different castes'; for this very author in the next portion of the passage lays down that the son born of a wife of the same caste though improperly married is heir to the paternal wealth. 'Woman of the same *gōtra*' means 'woman of the same *gōtra* married.' If the son of the woman improperly married be of the same caste with the father, then he is certainly heir. Similarly the son born of a wife of a

(1) Vasishtha, Chap. XVII, 52.

(2) Gautama, Chap. XXVIII, 43-45.

(3) Cole. Dig., Vol. II, 439, CCCXXXVII.

different caste but properly married is also heir. But the son of a woman begotten upon her by a husband of inferior caste is no heir. It is to this son alone that food and raiment should be given. If there be relatives, then they should give him food and raiment without stint. In the absence of relatives, he may himself take that wealth. But where his relatives had inherited wealth which was not his father's, then they should not be compelled to give him even food and raiment.

Brihaspati says: "The younger brothers whose initiation ceremonies have not been performed shall be initiated by their elder brothers out of the common paternal wealth."(1) *Commentary*—The form '*Yaviyasah*' is an *Arsha* substitute according to some for '*Yaviyamsah.*' Others hold that it is the genitive case of '*Yaviyan.*' In the result, the two views do not lead to any difference.

Vyāsa says: "The uninitiated among them should be initiated by their elder brothers out of their paternal wealth, as also the unmarried daughters in due form."(2) *Commentary*—The initiation of the unmarried is their marriage.

Nārada says; "The initiatory ceremonies of brothers whose initiatory ceremonies had not been duly performed by their father should be performed by their brothers out of their paternal property. Or if there be no paternal wealth, the initiatory ceremonies must invariably be performed by contributions from the shares of brothers whose initiatory ceremonies had been performed."(3) *Commentary*—The initiatory ceremonies here contemplated are those from *Jātakarma* to *Upanayana* inclusive.

Devala says: "Nuptial portions should be given to unmarried daughters out of the paternal wealth. The daughter virtuously begotten inherits like the son the wealth of the sonless deceased."(4)

Yājnavalkya says: "Brothers whose initiatory ceremonies had not been performed should be initiated by others already initiated; and the unmarried sisters also by giving a fourth part of their brothers' shares."(5)

(1) Brihaspati, Chap. XXV, 21.
(2) Cole. Dig., Vol. II, 297, CXXV.
(3) Nārada, Chap. XIII, 33 and 34.
(4) Cole. Dig., Vol. II, p. 296, CXXIV.
(5) Yājnavalkya, Chap. II, 124.

Vishnu says: "He should marry unmarried sisters in a manner suitable to his wealth."(1)

Manu says: "Let the brothers give to unmarried sisters portions out of their own respective allotments, each a fourth of his own share. Those who refuse to give shall be degraded." (2) *Commentary*—The meaning here is not that every brother should give a fourth of his own share; but the meaning is that the daughter should be given for defraying the expenses of her marriage a fourth of the share which a son of the caste with her would be entitled to under the circumstances. It, therefore, follows that out of the four shares to which the son of a *Brāhmanee* wife is entitled and out of the three shares which *Kshatriyas* are entitled to, a fourth share should be given. Here as many texts speak of a fourth share, a fourth share alone shall be given, the object being the marriage sacrament. The rule of Vishnu as to the giving of a fourth share should be understood in this light. Kalpataru, Prakāsa and Mitākshara also concur in this view. The view of Halāyudha and others is that in the light of the text of Vishnu, the rule that a fourth share should be given means by implication that as much should be given as may be needed for the sacrament. This is but reasonable, seeing that the performance of the sacrament is expedient.

Kātyāyana says: "A fourth share is ordered to unmarried daughters and three shares to sons. But where the property is inconsiderable, daughters are declared entitled."(3) *Commentary*—'But where, etc.,' means 'when the fourth share is small and more money is required for the sacrament, the unmarried daughters have a right to as much money as may be needed for the performance of the sacrament.' Therefore it follows so much money alone even when taking it out of his own share should be given by the brother in view to the sacrament; as also the *Stridhana* of the mother even while she lives.

Sankha and Likhita say: "Where partition is made, the unmarried daughter takes her own ornaments as also the *Stridhana*

(1) Vishnu, Chap. XV, 31.
(2) Manu, Chap. IX, 118.
(3) Cole. Dig., Vol. II, 297, CXXVI.

given to her mother at her nuptials."(1) *Commentary*—'Her own ornaments,' *i.e.*, anklets etc., the unmarried daughter takes.

Baudhāyana says: "The daughters shall take the ornaments of their mother usually given her or anything else given to her."(2) *Commentary*—This means that the daughter takes ornaments given to her mother during nuptials as also anything else but ornaments given during nuptials.

Again Baudhayana says: "The Srutis declare that women deserve no share; because they are considered weak and portionless."(3) *Commentary*—Prakāsa says the word '*Nirindriya*' means 'devoid of strength.' '*Adāya*' means 'portionless.' This rule applies to all women except those who are allowed a share.

Here ends the Chapter on 'Persons excluded from Inheritance.'

S. SITARAMA SASTRI.

(1) Cole. Dig., Vol. II, 299, CXXIX.
(2) Baudhayana, II, 2, 3, 43.
(3) Baudhayana, II, 2, 3, 46.

NOTES OF INDIAN CASES.

Tirupati Raju *v.* Vissam Raju, I. L. R., 20 M., 155. We are not quite sure of the correctness of the decision in this case. An inter-pleader suit by the Secretary of State to determine which of two persons was entitled to the payment of money due as compensation for land taken under the Land Acquisition Act does not in terms fall within any of the clauses of the second schedule to the Provincial Small Cause Act detailing the classes of suits exempted from the cognizance of the Small Cause Court. Cl. 14 speaks of a suit to recover from a person to whom compensation has been paid under the Act. In the case under consideration there was no payment prior to suit and the suit was one to determine the person who was entitled to it. Cl. 11 does not seem to apply either, for it was a suit to determine which of two persons was entitled to the money though that determination might depend upon their title to land. It might with equal force have been argued that a suit for damages for trespass to land fell within Cl. 11 when the title was disputed, or the action for damages was really brought for the purpose of determining the question of title to land. If we go by the strict letter of the Statute there seems little doubt that the inter-pleader suit in the present case is cognizable by the Small Cause Court. There is nothing

in the nature of an inter-pleader action to take it out of the category of suits tried by the Small Cause Courts.

Puthiandi Mammed *v.* **Avalil Moidin,** I. L. R., 20 M., 157. We do not see why a transfer of a decree is incomplete until recognized by a court. An assignee in writing of a decree may execute the decree at the discretion of the court. But whether the court allows him to execute the decree or not, the property in the decree passes to him from the moment of assignment. The fact that somebody else attached the decree as the property of the assignor cannot enable the assignee to treat the case as one of failure of consideration entitling him to sue for the recovery of the money paid. From the statement of facts, there does not appear to us to have been anything wanting on the part of the assignor to complete the assignment. The attachment by a stranger after the assignment appears to be invalid.

Venkatasubbaraya Chetty *v.* **Zemindar of Karvetinagar,** I.L.R., 20 M., 159. The learned Judges in this case hold that where a material irregularity in the conduct of a sale is established and there is substantial loss, the Court may infer as a matter of fact that the irregularity caused the loss and set the sale aside under S. 387. It has been authoritatively laid down by the Privy Council that the applicant must show that he has sustained loss by reason of the irregularity. See *Olpherts* v. *Mahabir Pershad Singh,* 10 I. A., 25, and *Arunachellam Chetti* v. *Arunachellam Chetti,* 15, I. A., 171. But we do not suppose that this view precludes the inference in a particular case that the injury being shown and the irregularity, it was the result of such irregularity.

Mallikarjuna *v.* **Sri Devamma,** I. L. R., 20 M., 162. We are glad of this decision of the Privy Council that in the case of heriditary trustees one trustee succeeding another has not to take out succession certificate to collect debts due to the predecessor.

Suba Singh *v.* **Sarafraz Kunwar,** I. L. R., 19 A., 215. This decision of the Full Bench appears to us to decide an important principle of Hindu Law, of the preference of the whole blood to the half blood in succession. There can be little doubt after the elaborate discussion the question has undergone as to the correctness of the decision at which the Full Bench has arrived. The decision in *Samat* v. *Amra,* I. L. R., 6 B., 394, appears to be distinguishable, for that is a case of the representative of the half blood being nearer in degree.

Rani Kano Dai *v.* **B. J. Lacy,** I. L. R., 19 A., 235. Chief Justice *Edge* and *Blair,* J., lay down that a money decree-holder against a

sonless separated Hindu cannot proceed to recover the money from the rents and profits of her husband's estate in her hands. It is conceded that he can proceed against the *corpus* of the estate. The income of that estate is no doubt at her absolute disposal and she is not bound to add the unexpended balance to the *corpus*. But the estate comes into her hands burdened with the debt, and the accretions to that estate would seem to us to be liable to the same burden as the estate itself.

Bitto Kunwar *v.* **Kesho Prasad Misr,** I. L. R., 19 A., 277. A point of some importance is disposed of in this judgment of the Privy Council. A judgment in a prior action between one of the parties and strangers had held that the will had been revoked. This judgment was considered by their Lordships of the Privy Council to be evidence of the revocation in a subsequent case. The question is one of considerable difficulty, but it is disposed of summarily with the remark that the judgment is evidence. It is difficult to bring it within any section of the Evidence Act and there is considerable conflict of judicial opinion in India. Such a question deserves to be more fully dealt with than has been done by their Lordships.

Dhiraj Singh *v.* **Mangha Ram,** I. L. R., 19 A., 300. With great respect to the learned Judges who decided this case, we are inclined to doubt its correctness. A widow borrowed debts for legal necessity. Is the creditor entitled to sue the reversioner after the widow's death for recovery of the debt from the estate which has passed from the widow to the reversioner. Their Lordships appear inclined to concede that if the widow had mortgaged the estate, it would be liable in the hands of the reversioner. Otherwise they consider that the debt is borrowed on the widow's personal security, and the estate in the hands of the reversioner would not be liable. The widow has two capacities, one as representative of the estate and the other her own personal capacity. It is competent to her to borrow a debt in either capacity just as it is competent to the manager of a Hindu family to borrow a debt for purposes binding on the family or for his own purposes; and although the debt be simple it would be competent to the creditor to proceed after the manager's death against the family property in the hands of the survivors or the personal assets of the deceased according to the nature and character of the debt. It appears to us similarly competent to the creditor of a widow, no matter whether the debt is a simple debt or a mortgage debt to proceed against the reversioner or the representatives of her individual estate according as the debt was for justifiable necessity or for her own private purposes. We are inclined to agree with the

decision in *RamcoomarMitter* v. *Iohamoyi Dasi*, I. L. R., 6 C., 36. Where, however, it is clear that the loan was contracted upon the widow's personal security alone, it will be competent to the creditor to proceed only against her representatives irrespective of the character of the debt.

SUMMARY OF RECENT CASES.

Lease—Covenant running with the land.

White v. Southend Hotel Company. [1897. I. Ch. 767 C. A.]

A lease of a hotel by a wine merchant for thirty years at an annual rent of £ 1,500 contained a covenant by the lessee that he shall not, during the continuance of the lease, buy or sell any foreign wines on the premises except those supplied by or through the lessor or his assigns, in consideration whereof the lessor was to allow an abatement of £ 75 from each quarterly payment of rent; the abatement was to cease if the lessee was to break the covenant. The covenant was not wide enough to include the assigns of the lessee. The lessor died during the term and the plaintiffs were assignees from his executors; and the lessee assigned his lease to the defendants. The defendants claimed that so long as they continued to buy their wines from the plaintiffs, they were entitled to a deduction of rent according to the stipulation. The plaintiffs, on the other hand, insisted that the covenant was a personal covenant with the defendants' assignors.

Held: by the Court of Appeal that, notwithstanding the omission of the word "assign," the burden of the covenant ran with the tenant's interest so as to bind the assignee, although not named.

Bankrupt's estate—Void and voidable—Boná-fide purchaser.

In re **Caster and Kenderdine's Contract.** [1897. I Ch. 776 C. A.]

A. derived title to certain property under a voluntary settlement executed by the owner of the property who however became a bankrupt immediately after. A. sold the property to a *boná-fide* purchaser for value. The purchaser came to know, after the sale to him, that the original conveyance to his vendor A. was liable to be set aside under S. 47 of the Bankruptcy Act of 1883 (46 and 47 Vic. c. 52). He therefore refused to complete the purchase on the ground that the vendors cannot give him a good title. The 47th section of the Bankruptcy Act runs

thus:—"Any settlement of property not being a settlement made before and in consideration of marriage, or made in favor of a purchaser or incumbrancer, in good faith and for valuable consideration ....
...............shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy."

Construing this section, the Court of Appeal held, that the word "void" in the section only meant 'voidable,' so that, if before the time the settlor becomes a bankrupt and his estate rests in the trustee in bankruptcy, it is sold to a *boná-fide* purchaser for value, such purchaser will have a good title against the trustee.

Cf. S. 24 of the Insolvent Debtors Act of 1848 (11 Vic. c. XXI) upon which also a similar construction ought to be put.

Trade name—Intent to deceive—Injunction—Account of profits.

Saxleher *v.* **Apollinaris Company** [1897, I., Ch. D., 893, per *Kekewich*, J.].

The plaintiff had been selling certain Hungarian bitter waters under the name "Hanyadi janos." The defendants were his agents in the United Kingdom, and through their exertions the waters had acquired an extensive popularity and in the market the term "Hanyadi" had come to indicate solely the plaintiff's waters. The defendants began to sell some other bitter waters recently on their own account, and this they styled "uj Hanyadi," or new Hanyadi, and to this they attached a small yellow label with a red diamond. This label had been for so long a time affixed by the defendants to the plaintiff's waters sold by them, that the public had come to believe that any water not having this label was not genuine Hanyadi water. The plaintiff sued for an injunction ordering the defendants to desist selling their waters with the above marks and for an account of profits. *Kekewich*, J., held that the plaintiff was entitled to the reliefs asked for except the one for the removal of the yellow label, as that was intended only to denote waters sold by the defendants, and was not in itself when not coupled with "Hanyadi" calculated to deceive.

The principle of law that "Nobody has any right to represent his goods as the goods of somebody else" is perfectly general, and has no limit as regards name, origin, honesty of manufacture or sale, or otherwise.

If in any case the defendants' goods on the face of them, and having regard to surrounding circumstances, are calculated to deceive, no evidence is necessary to prove an intent to deceive as it must be taken that a man intends the natural and reasonable consequences of his acts. If on the other hand such a comparison with the aid of the surrounding circumstances is insufficient, then evidence *aliundee* of the intent to deceive may be let in.'

The right to use and protect what is styled a common law trade-mark is not identical with the right of an individual in a registered trade-mark, such as a patent. The latter is a species of property. It is doubtful whether in the case of a common law trade-mark an order for an account of profits should necessarily follow an injunction.

Arbitration, contract to refer to—Bar to suit.

Renshaw v. Queen Anne Mansions Company, [1897, I, Q. B. D., 662, C. A.]

By a contract with the defendants the plaintiff had agreed to serve them for a period of five years, and the defendants had agreed to employ the plaintiff for that period, unless the plaintiff should misconduct himself so grossly as to justify them in dismissing them previously to its expiration. The contract further provided that if at any time any dispute, difference or question should arise between the defendants and the plaintiff touching their or his rights and liabilities under the agreement, it should be referred to arbitration. Before the expiration of the period of five years provided by the agreement the defendants dismissed the plaintiff for some alleged misconduct. The plaintiff then sued the defendants claiming damages for wrongful dismissal, notwithstanding that the defendants were ready and willing to refer the whole matter to arbitration as per terms of their agreement.

The plaintiff contended that the defendants, by dismissing the plaintiff without referring the question whether he was guilty of misconduct to arbitration, had broken the contract, and that consequently the agreement to refer was no bar to the suit.

Held by the Court of Appeal that the two questions whether the plaintiff was guilty of misconduct and whether the defendants had therefore a right to dismiss him were within the terms of the agreement to refer which was capable of being enforced under section 4 of the Arbitration Act of 1889.

Contract in writing—Envelope with letter inside.

Pearce *v.* **Gardner,** [1897, I. Q. B. D., 688, C. A.]

The plaintiff sued the defendant for damages for not carrying out a contract to sell a quantity of gravel to the plaintiff. The defence was that either under section 4 of the Statute of Frauds or under the Sale of Goods Act, 1893, the contract in question and the names of the parties must be in writing. In this case there was a letter from the defendant signed by him, but commencing with the words "dear sir" and containing no name to indicate to whom it was written. It was proved at the trial that this letter containing all the terms of the contract, and signed by the defendant, reached the plaintiff in an envelope directed to him.

Held (by the Court of Appeal) that the letter and the envelope can be taken together to constitute the memorandum required—Per *Lord Esher*, M. R.: "The common sense of the matter seems to me to be that the envelope and the letter within it were sent together and may be taken together; so that the effect is the same as if the name of the plaintiff had been written at the foot or indorsed on the letter."

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Provincial Small Cause Courts Act and Succession Certificate Act by C. V. Visvanatha Sastri, B.A., B.L.

The Albany Law Journal for July (*in exchange*).

The University Law Review for June and July (*in exchange*).

The Educational Review for June and July (*in exchange*).

The Calcutta Weekly Note for July (*in exchange*).

The Green Bag for July (*in exchange*).

The Allahabad Weekly Notes from January to July (*in exchange*).

The Canda Law Journal for June (*in exchange*).

The Canadian Law Times for June (*in exchange*).

A Fool Legislation.—A bill recently introduced in the Illinois Legislature provides that "any newspaper found guilty of unduly eulogising any person or persons, thus falsely building for such person or persons a reputation without merit, thereby misleading and deceiving the public, shall, after ten days' notice served in writing upon the publisher or publishers of said newspaper of the false and misleading character of said eulogy, make a retraction or correction of said eulogy, in manner

and place as conspicuous as was its original publication, for three succeeding issues of said newspaper. This Act shall not apply to deceased persons, nor be operative against funeral orations nor obituary notices."

As an example of pure and unadulterated fool legislation, this is certainly entitled to the first premium:—*The Albany Law Journal.*

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Assexualization of Feeble Minded and Criminal Persons.

Another piece of proposed legislation, though perhaps not properly classed with the above, is so radical, not to say revolting, that it should be thoroughly discussed. This bill, known as House Bill No. 672, was introduced by Mr. Edgar, in the Legislature of Michigan, and is entitled "A bill to provide restrictions relative to persons, inmates of certain State institutions, that such inmates shall cease to be productive, providing rules and modes of procedure to restrict the propagation of their kind." The bill is so important in some of its provisions that it is given herewith entire.

"Section 1. *The people of the State of Michigan enact,* that all persons inmates of the Michigan home for the Feeble Minded and Epileptic and all persons who shall hereafter become inmates of said Home for the Feeble Minded and Epileptic, that such and every person confined in said institution and before he or she is discharged shall be caused to submit to an operation that causes assexualization, that such persons shall cease to be able to produce their kind."

"Section 2. All persons who shall have been convicted of a felony a third time and so stated by the court, the first or second conviction having been committed in this State or some other State of the United States, upon conviction and sentence to a Michigan State Prison, all of such persons so convicted and sentenced at a time prior to the expiration of such known third sentence shall be caused to submit to an operation that causes assexualization and stops their ability to produce their kind."

"Section 3. The superintendent, warden or other person having charge of such home for the feeble-minded and epileptic and such prisons as shall contain such persons as provided for in Ss. 1 and 2 of this Act, the medical superintendent in charge of said institution shall perform such operation, or if from inability at the time he may call to perform or assist in the performance of the same any physician or surgeon of this State. The superintendent, warden or other person in charge of said

institution may pay to such operator a sum not more than twenty-five dollars for each and every operation so performed, and in no case where the operation is performed by the physician employed regularly by the within-named institution shall there be paid any extra compensation."

"Section 4. In each and every case before such operation shall be performed, if the person be feeble-minded or epileptic, confined within a prison in this State, the matter shall be presented in writing to the Board of Control of such institution, wherein it shall be shown that such operation would benefit the subject physically and morally, or that it is necessary as a restrictive measure to prevent propagation of his kind in case the subject is discharged from the institution. The Board of Control shall, after being satisfied of the advisibility of such operation, authorize the medical superintendent to perform the same, after first giving notice in writing to the parents or guardian of such person at least ten days before such operation."

"Section 5. That whoever shall have been convicted of the crime of having ravished a child or woman while upon the streets of any city, village, public highway, or any other place within this State, it shall be the duty of the Judge making such sentence to include in such sentence that within one year after being confined in such prison, an operation which causes assexualization shall be performed as provided in Ss. 3 and 4 of this Act."

"Section 6. The penalty for non-compliance of this Act shall be just cause for removal and forfeiture of the position of such superintendent, warden or other person named in this Act."

The measure will undoubtedly provoke much discussion, and even leading penologists are likely to disagree as to the wisdom and propriety of enacting it into law.—*The Albany Law Journal.*

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Are there too many lawyers:—This is the happy commencement season. Institutions of learning all over the land are turning out the graduates, armed with the much prized diploma, and more or less thoroughly equipped to fight the battle of life. To drop the ideal and the theoretical and wrestle with the practical is one of the first lessons to be learned in the great school of experience. Neither law schools nor any other institutions of learning can change a man's nature any more than they can add to his stature. They can only instil into his mind correct principles and habits of thought. Their principal function is to

teach him how to learn, to point him to the fountains of knowledge, and to show him the best method of acquiring it. No school can guarantee the success of its graduates, for that depends wholly upon his own energy, ambition, natural aptitude and perseverance. It is perhaps true that in no profession are the misfits so numerous, and in none is their condition so hopeless, as in the legal profession. That that profession is overcrowded no one will attempt to deny. We are told, on good authority, that there are over 8,000 lawyers within the boundaries of Greater New York. How they all make a living is one of the unsolved mysteries. The prizes of the profession are alluring, but they are few. Where one lawyer succeeds in acquiring a large fortune, hundreds merely eke out a precarious living, and many have to resort to questionable, if not absolutely criminal, practices in order to keep body and soul together. Proof of the terribly congested condition of the profession is easily given. Here are a few advertisements taken at random from the columns of a New York legal publication:

Wanted—By attorney, 15 years' practice, position in law firm as managing clerk, or assistant in trial of cases; will take $6 per week.

A Bright, Middle-aged Lawyer (notary), thorough in practice and procedure, desires managing clerkship; salary moderate.

Clerkship Wanted.—Managing or assistant; competent attorney; college and law school (Columbia); highest references; moderate salary.

Wanted.—Bright young attorney (admitted); familiar with city practice; in law department mercantile agency; salary to begin, $5.

Wanted—*A Young Attorney*, with six years' experience, good references, desires position; salary, $10.

Wanted.—Position as law clerk or stenographer, by lawyer, eight years at bar; highest references; salary, $8 per week.

Here we find middle-aged as well as young lawyers, some of them with college and university training, seeking positions at the starvation wages of $5 per week! Could there be stronger proof given that there are too many lawyers—so-called? But be it remembered that it is just as true now as it ever was, that there is always room at the top. There are not too many good lawyers, but too many professional misfits, too many men who have mistaken their vocation. Thousands of young men who are struggling to win a precarious living at the bar could doubtless have done well, if not amassed a competence and proved a positive benefit to society, in some trade. Undoubtedly one of the greatest causes of this congestion of the professions is the widespread notion that manual

labor is unworthy, and, in a sense, degrading—a mischievous idea which it ought to be one of the purposes of every institution of learning in the land, as well as of every parent, to stamp out. It is more than unfortunate—it is almost a crime—to spoil a good mechanic to make a failure of a lawyer. This is not at all an argument against law schools, or law departments of universities. The ranks of the legal profession must be recruited, and no better method of doing this has been devised than the agency of well-organized and thoroughly equipped law schools, in conjunction with stricter and more practical bar examinations. Happy, then, is he who early discovers that he has mistaken his calling, and leaves the profession for which he is not fitted.—*The Albany Law Journal.*

The same may be observed of the state of the profession in this country too. Manual labor is considered degrading and the higher the caste the more it is felt to be so. As soon as a youth takes the Degree of Bachelor of Arts, he is in a fix as to what course he is to adopt. The utmost that he can get, if he has some wealthy or influential relatives to back him up, is a pittance of Rs. 15 a month. He naturally wishes to postpone the day of decision. There is the law-course which takes three years to be gone through and he finds that that will remove his anxiety for some time; and regardless of anything that qualifies one for the profession, aptitude, wealth and strength to persevere even at the risk of starvation, he joins the law class and finds himself in the plight in which his American brethren are described to find themselves in.—ED.

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Wise Words to Young Lawyers.

The following extract is from an address delivered by Judge Herrick of Albany to the graduates of the Albany Law School and we commend it to the careful perusal of every young lawyer who seeks to win place and profit in his profession.

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I will assume, however, that you have determined upon your career, have passed your final examinations, and been licensed to practise. Do not think your time for study has ended, and that you have only to wait for business, and do not be discouraged because clients do not flock to your office. Some one has said that it is one of the merciful dispensations of a Divine Providence that a young lawyer's clients are few and far between, in order to give him time to learn something about his profession.

While waiting for clients to come is the time for earnest thought and study. It is the period in your life for "moderate living and high thinking." It is the time to lay broad and deep the foundations of your professional career, it is the time of waiting; it affords opportunities to the study of law. It will be time enough to study cases when your clients come. Make the most of this time of waiting; the opportunities it affords to equip yourself for the higher branches of the profession, and its great responsibilities will never come back to you.

Do not make the mistake of thinking that it will be time enough to equip yourself when the case comes and the occasion arises for the use of your knowledge. It has frequently happened that the case and the opportunity has been presented to a lawyer to establish his reputation upon a firm foundation, but from lack of a broad knowledge of his profession he has failed to realize its possibilities, and his chance has gone, never to return.

* * * * * * * * * *

Do not, in your efforts to fit yourself for your future career, confine yourself merely to the law; the lawyer whose knowledge is confined solely to that to be found between the covers of law books is only partially fitted for his profession. He may become a sharp, keen, acute practitioner, but always a narrow one; he may know the letter of the law, he will not fully realize its spirit; and upon large questions will fail to meet the demands made upon him. There is no branch of knowledge that comes amiss to the lawyer.

Everything that concerns the affairs of men sooner or later touches the law, and needs the lawyer.

Of course, it is not to be expected that you will master all branches of knowledge, or all professions. The human mind is not adequate to such a task; and when you get a case that requires special scientific or professional knowledge, you can secure the assistance of a specialist, but it may well be that without any general knowledge of a subject you will not appreciate that it enters into your case, or realize that you need the assistance of a person learned in that particular branch of knowledge until it is too late.

Let the creation of your law library go hand in hand with that of a general library.

But in your study of books do not become a recluse. The study of men is of just as much importance as the study of books.

Learn to know them and their pursuits, and all the phases of human nature. Acquire a knowledge of business and of public matters. The successful lawyer must, in these days, be a man of affairs.

The all-round lawyer must not only be a warrior to fight his client's battles, he must also be an adviser, a negotiator and diplomat.

The preparation, trial and argument of cases is but a portion of a lawyer's business. He must be prepared to advise in business affairs, to negotiate the settlement of controversies. The reputable and skilful lawyer does not promote, but composes, contentions.

Some of our greatest and most prosperous lawyers seldom or never appear in court. Great legal victories are frequently won, not in court, but in the office, where diplomacy and skill in handling men and measures preserve reputations, save families from disruption, keep great business houses from wreck and ruin, harmonize conflicting and contending interests, and make possible the combinations of men and capital necessary to carry forward the great commercial enterprises of the age.

The things require, not only legal learning and ability, but a knowledge of men and affairs, and frequently a fineness as delicate as the touch of a woman.

It is lawyers possessing these qualifications that are sought by the great corporate and business interests of the country.

These interests are generally in the hands of men of a high order of ability; when they require legal assistance they want the best. They possess the intelligence to understand and appreciate ability in others, and they are willing to pay for it. The result is that our best legal talent is rapidly drifting into the almost exclusive employment of the great corporate and commercial interests of the country.

I have advised you to acquire a knowledge of public affairs. I mean something more than merely reading about them. Take an active part, so that you will acquire a practical knowledge.

First, because good citizenship demands it. Every citizen owes some service to the State.

The better trained and educated a man is, the higher that duty becomes, and the more valuable the service he can render.

In this country the man who does not take an interest in public affairs is not a good citizen, and is not fit for public service either upon

the bench or elsewhere. The more intelligent and active an interest he takes, and the more vigorous and robust a personality he becomes, the better fitted he is for high positions of public trust and honor.

Second—Take a part in public affairs for your own benefit. It enlarges your ideas; it makes you a broader man. It gives you a new and larger conception of law and the statutes.

It will give you a greater knowledge of men and of the springs of human action, which will be invaluable, particularly in the trial and argument of cases.

It will also greatly enlarge your acquaintance from which to draw business.

But be careful, very careful, not to become too much absorbed in politics; it is a seductive pursuit, and its pleasures and enjoyments continue to allure long after all other amusements have become stale and flat, and unless held firmly in hand it is well calculated to wreck your professional career. The law is a jealous mistress, and will not permit devotion to any other shrine.

Still, public service and high legal standing are not incompatible.

Almost every Chief Justice and Lord Chancellor of England, and most of the Judges of the first class in this country, have taken an active part in public affairs before their elevation to the bench, and such participation has only the better qualified them for their high duties, and rarely, very rarely, has partisanship swayed their rulings.

Lawyers stood in the forefront of every struggle for English liberty, and in our own country, from Adams and Otis to Lincoln, have been leaders in every battle for human rights, and are still rendering valuable, voluntary, unbought service to the State and nation.

While, therefore as good citizens, as well as for your own advancement, I advise you to take an active part in public affairs, do not do so for the sake of obtaining office.

Take no office except strictly in the line of your profession, unless under very exceptional circumstances. Except to escape starvation, do not seek for or accept any political clerkship. Do not be a seeker for political business. If it comes to you voluntarily, is honorable, and the compensation fair, well and good, but do not seek it. In doing so other and more lasting clientage is lost; you become more and more dependent upon it, and I know of no more contemptible figure in the profession than the legal political bone hunter.

But let us return to our studies. While fitting yourself for your professional career, do not fail to qualify yourself to present cases to courts and juries. Of course, much of that ability comes only from practice and experience, but much also can be acquired by previous thought and preparation.

It has always been a matter of surprise to me that in the two professions, the law and the ministry, where the ability to present their views in the strongest possible manner is of such great importance, so little attention is apparently given to the art of public speaking. There is an impression, I know, with many people, that oratory has ceased to be effective. This, I think, is a mistake. The style of oratory which is effective has perhaps changed; the people are better read and more intelligent, and it requires greater knowledge and skill to convince or move them, but clear and persuasive oratory is just as effective as ever.

It has been said "the orator is born, not made," and while you may not have that heaven-born fire and genius, still much may be done by study and practice to make you a powerful and persuasive speaker.

Study to be clear in your statements of law and fact, and bear in mind always that you cannot make a clear statement unless you have a clear and perfect understanding of the matter yourself. Make your statements in clear, precise, simple English; use small words when possible.

In arguments before courts, when you have made a perfectly plain, full and clear statement of the facts, your case is more than half argued.

Avoid all mannerisms and affectations. Speak easily and naturally. The highest art is to conceal the art you are employing.

Speak as if you were dead in earnest, and meant and believed every word you said. In the vast majority of cases there is no occasion for splendid rhetoric or declamatory display; indeed, they would be out of place.

The advocate who wins the verdicts is the one who make himself the thirteenth juror, and in plain, earnest, simple Anglo-Saxon, with no apparent art of oratory, satisfies the remaining twelve that his side is the right side.

This art was perhaps possessed in the greatest perfection by Scarlet afterwards Lord Abinger, one of the most effective jury lawyers ever known at the English bar. He was a contemporary of Lord Brougham, who had a world-wide reputation as a great orator and advocate. This story is related of them: An English farmer, who had been attending a

circuit, in speaking of the trials that had there taken place and the lawyers engaged, said : Brougham is the man for my money ; he is a great orator, an eloquent man, and if I ever get into trouble he is the lawyer that I want." "But," said one of those present, "I see that you decided against Brougham in all the cases he was in, and in favor of Scarlet." "Oh," said he, "that is all right. Scarlet is a nice man, and he chanced to get on the right side in all those cases, and we had to decide with him." Scarlet had made himself the thirteenth juror.

If you expect to become trial lawyer, or to argue your own cases, you must assiduously cultivate this art of public speaking. It is absolutely necessary in those branches of the profession.

It is surprising how few really good trial lawyers we have. I do not speak of first-class trial lawyers, because men of the first class are few and far between in every profession, calling or business; but the moderately good trial lawyer is rare, and there is hardly a bar in the State but what has room for one or more lawyers who can present cases to courts and juries with ability and skill.

I have not the time to give you my ideas as to what constitutes a good trial lawyer, or as to how you should study and practice to make yourself one; I can only say, do not despise the day of small things. Take hold of the smallest cases that are brought to you, and exercise all your skill and arts upon them. Do not refrain from going into the lower courts; make them your training schools. The old country justices' courts were the training schools for the greatest trial lawyers and advocates this country has ever known.

Prepare your cases thoroughly. Make yourself master of all the facts and the law in your case, so that you know more about it than any other human being. Thorough preparation upon both the law and facts is one of the greatest secrets of success.

In preparing upon the law, either to advise your client or for your brief for the court, strive to be intellectually honest—honest yourself. By that I mean, do not permit your desire to assist your client or your case warp your judgment as to principles or color your opinion as to what a case has really decided. Strive to find out what the law really is, not what it is the interest of your client to have it—that is the only way to become a safe adviser.

In starting out in your professional career, be careful and guarded in your conduct towards your brethren in the profession. Do not

acquire the reputation of being a sharp practitioner. Let your simple word be as good as your oath or written stipulation; do not depend upon tricks to overreach, or obtain advantage of your adversary. Be sharp, keen and acute to detect and prevent impositions upon you or your client; but do not depend too much upon mere sharpness or keenness to advance your own causes.

Be absolutely candid with the court; do not attempt to mislead it. Remember you are one of the officers of the court whose duty it is to assist it in ascertaining the truth; it has a right to rely upon you, and will until you prove untrustworthy.

The lawyer who is not candid with the court, who attempts to deceive or mislead it, soon becomes a marked man. He may continue to be treated pleasantly and courteously, perhaps with that extreme courtesy that sometimes marks the lack of cordiality, but his every word and act is watched and scrutinized; nothing is taken upon trust; and while his client is not consciously permitted to suffer, yet his services have become practically valueless to that client.

While it is the duty of the courts to mete out justice irrespective of persons, that applies more particularly to the causes and the clients, and not to the counsel. It is natural that the man of great learning and industry, who understands and thoroughly prepares his cases, who is honest and candid with the court, should have, and deservedly have, great weight with it. Ability and high character are entitled to, and will receive, corresponding weight and consideration in whatever forum they appear.

The man who gains the reputation of being sharp and tricky seldom advances to any high position in the profession, but spends his days as he begins his professional career, to use the words of Sheridan, "picking up small fees and impudence," and never reaches the higher grades of the profession and the accompanying emoluments and honors.

In all your acts and dealings so conduct yourselves that you will not be ashamed to have any of them exposed to the full blaze of public scrutiny and criticism.

The profession is much misunderstood, and from time immemorial the lawyer has been the subject of ridicule and abuse, and it is, therefore, so much the more important that, not only in his professional life, but in his daily walk and conduct, he should so conduct himself as not to give just occasion for reproach.

No matter how upright he may be, he cannot escape calumny, but he can avoid just cause for it, and sooner or later the community will recognize the rectitude of his life.

Never commence an action unless you think your client ought of right to succeed. In the defense of an action a different course is permissible, and so long as you do not prevert or suppress testimony, you can properly assist your client in procuring the opinion of the court or jury as to his rights and duties, and not usurp their functions yourself. Every man has a right to his day in court, and the right of counsel to present his side of the controversy.

Never lend yourself to any scheme for making money out of any person's lapses from virtue or morality. The only place for the lawyer who assists the blackmailer is to share with him the felon's cell.

While it is the custom of the ignorant and thoughtless to malign and abuse the profession, yet the very persons who do so do not hesitate, when in trouble or difficulty, to fly to some member of the profession which has been the subject of their abuse, and confide their troubles to him, unfold to him the innermost secrets of their lives, and place fame, good name, fortune, and even life itself, in his hands, feeling and believing that the trust will not be betrayed, and that the fidelity of the lawyer thus employed can be absolutely relied upon.

There is no class of men, either professional or otherwise, that have so many, vast and varied interests committed to their fidelity, and where so few betray the trust.

I hope that it is unnecessary to impress upon you the duty of absolute fidelity to your clients.

Lord Brougham, upon the trial of Queen Caroline, made this declaration as to the duty of an advocate to his client:

" An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among others, to himself; is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others."

"Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."

I think it is the consensus of professional opinion that Lord Brougham, in the heat of conflict and in his desire to let it be known that the defense was not to be intimidated by the king, went too far.

The means and expedients resorted to to save your client must be neither dishonest nor dishonorable; neither must you sacrifice the innocent to save your client or your cause, and your duty as a patriot is superior to your duty as an advocate. With these limitations, it seems to me the definition I have quoted as to the duty of an advocate may be accepted, with this addition, that under no circumstances are you to reveal the confidences of your client without his consent. They are his secrets not yours; and should be regarded as sacred as the revelations at the confessional.

This obligation exists, not only while the relation of counsel and client continues, but after it ceases, and is to be carried inviolate to your grave.

These suggestions, trite and commonplace, to the old lawyer, I trust may be of some little use to you, in calling attention to what you may usefully employ yourself about in the waiting years of your professional life, and also your obligations and duties from the beginning to the end of your career.

In closing, let me say, enter upon your professional career as you should upon the trial of a cause. Having, after careful thought and preparation, determined upon your course, enter it not timidly or half-heartedly, but cautiously and prudently, firmly and fearlessly, and if you do not achieve success, you will, at least, deserve it.—*The Albany Law Journal.*

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Divorce case:—Judge Randolph of Kansas was hearing a divorce case last fall. The witness was the plaintiff, a white-haired man, broken in health and in spirit, and wearing a bronze button in his lapel. The examination was severe and the session monotonous.

"You say your wife abused you; tell us just how," thundered the attorney.

The witness looked appealingly at the Judge.

"Answer the question, sir," was the order from the Bench.

"Well, she said I was an old hypocrite to be proud of my war record. She said all the brave men who went to the war were killed, and that only the cowards and deserters lived to come back, and ——"

"Stop!" commanded the aroused Judge. "This divorce is granted.

The court spent four years in that war —— and the court came back."

The monotony was broken for that day.—*The Albany Law Journal.*

REVIEWS.

The "Provincial Small Cause Courts Act and Succession Certificate Act" by Mr. Visvanatha Sastry, B.A., B.L., Vakil, High Court, Madras. This little book will be found very useful both by practitioners and judges. The notes on the sections are succint and generally accurate. The get-up of the book is excellent. The author, though generally careful to keep in view the distinction between the former Small Cause Courts Act and the present Act, sometimes mixes up the two. At p. 48, for instance, *Ram Joy Moojoomdar* v. *Kedar Narain*, 25 W. R., 75, is quoted as authority for the proposition that a suit to recover from the guardian of a minor rents collected by him, which he did not account for, is not cognizable by a Small Cause Court as the guardian is a *trustee.* Under Act XI of 1865, if the suit was not based on a contract, and was not one for damages, the jurisdiction of the Small Cause Court was ousted; and the soundness of the decision therefore is unquestionable. But it is by no means clear that the word "trust" in clause 18 of the 2nd Schedule to the present Act will include construc-

tive trusts of the nature which alone can be fastened on a guardian. The author might have drawn attention to this distinction. The criticisms of the author of the judgments of the High Courts where he ventures on them are cautious and sound. On the whole, he is to be congratulated on the success of the brochure and we have no hesitation in commending the book to the profession.

The Madras Law Journal.

PART VIII.] AUGUST 1897. [VOL. VII.

GOVERNMENT OF INDIA ON APPEALS.

We published in the May and June number of this Journal an important resolution of the Government of India relating to the cutting down of appeals in civil cases. The Government of India observe that the proportion of appeals preferred from the judgments of original courts is much larger in India than in England, and that the honest man with slender means is at the mercy of the man with a long purse, however unjust his cause may be. A comparison is made of the figures relating to appeals from the County Courts in England with those relating to appeals from the decisions of the Regular Courts in India in original suits. A number of suggestions are made, calculated in the opinion of the Government of India to reduce the number of appeals and to promote justice. There are several points in the comparison which betray considerable ignorance of the conditions under which the comparison is made.

In England there is no appeal provided by law from the decisions of the County Courts, except on questions of law or procedure, or of the admissibility of evidence. Where either of the contesting parties desires it, the action is triable by a jury if it exceeds £5 in value. (See Ss. 100 and 101 of 51 and 52 Vic. ch. 43.) If appeals from County Courts in England are the standard of comparison, it would be proper to take the number of revision petitions filed in the High Court under S. 25 of the Mofussil Small Cause Courts Act as a safer test, such petitions being of the nature of appeals on questions of law from the decisions of Courts of Small Causes. The ordinary limit of the small cause jurisdiction in England is 50£, though in certain actions of the nature of those that are decided by the Chancery Division of the High Court a limit of 500£ has been fixed. (See Ss. 56 and 67 of 51 and 52 Vic. ch. 43). The classes of suits triable by the County Courts are

generally like those that fall within the province of a Mofussil Small Cause Court, though there are some differences of detail. It ought, however, to be remembered that a sum of Rs. 5 is to an Indian what, perhaps, a sum of £50 is to an Englishman, the average income per head of the population in India being very much less than that of an Englishman in England and the accumulated wealth of India bearing a very inconsiderable proportion to that of England. If we are to take into account the disparity in the pecuniary positions of the respective peoples and the high qualifications of the judges presiding over the County Courts in England who generally compare favorably with our High Court judges in regard both to intellectual calibre and legal attainments, the impropriety of the comparison will become apparent. The County Court judgeships in England are all of them filled by barristers of learning and experience while the majority of our judges in India are ignorant of the rudiments of law. Having regard to the differences pointed out, it seems natural that a greater amount of finality should be allowed to the decisions of County Courts in England than can be accorded to those of the subordinate judiciary in this land.

There is a prevailing impression that the people of this country are exceedingly litigious. We are unable to see what foundation there is for this inference. Certainly, the figures cited do not warrant the inference, as many factors have to be taken into consideration before instituting the comparison. We have already pointed out some, and it is necessary to draw attention to another important factor. Glancing at the reports, one is fairly staggered by the enormous number of cases dealing with questions of adjective law forming the large majority of the cases reported. A system of laws, which necessitates a great divergence of opinion as regards the interpretation of rules of procedure or limitation or relating to stamp or registration, can never be regarded as satisfactory. It is difficult to find sometimes a single case upon the Law of Limitation in the English reports of a whole year. But scores of them meet your eye, as you glance through the pages of the indexes of your Indian reports, and again, much divergence of views between the several High Courts upon these questions. How can the people be blamed if, with reasonable hopes of overturning the judgment of the lower court upon some technicality or other, they appeal to the

wisdom of an appellate tribunal. The excellence of adjective law consists in its simplicity, and that department of law in this country is as complex and difficult to understand as it can be.

Having premised these observations with regard to the circumstances which vitiate the comparision between litigation in India and in England, we proceed to consider the remedies proposed which betray an amount of ignorance, not easy to understand, in the Government of India, from which the resolution in question proceeds—

1. The first suggestion is that where appeals from lower courts are heard by a single judge of the High Court, there should be no appeal from his decision under the Letters Patent or otherwise, except by leave of the judge. We may at once point out that the decision of a single judge on appeal is under any circumstances highly unsatisfactory. Appeals are always heard in England by Divisional Courts of two or more Judges, and appeals from the decisions of Country Courts on questions of law may be carried up to the House of Lords, passing through the intermediate stages of the High Court and the Court of Appeal. There is no confidence in the country in the judgment of a single judge of the High Court having regard to the qualifications possessed by our judges in this country. If single judges of the High Court dispose of cases satisfactorily, it is in no small measure due to the wholesome fear of an appeal. The great advantage of an appellate tribunal presided over by more than one judge consists in the fact of the prejudice or the bias or the angularities of an individual judge being in some measure removed or neutralized by another judge co-operating with him. To take away that privilege and tell the party that there is no appeal from the decision of a single judge is to inflict certain injustice in the large majority of cases and to create certain discontent among the litigants. Again, to leave it to the judge himself who decides the cases to determine whether an appeal can be taken from his judgment will have a demoralizing effect. We have no reason to think that such a power will be exercised satisfactorily. Public opinion and the traditions of the Bench are not so powerful, nor are our judges sufficiently enlightened to regard an appeal from their judgments with perfect equanimity. We have no hesitation, therefore, in condemning the first proposal.

2. The second proposal is that there should be no appeals from the decisions of a single judge on the Original Side of the High Court in suits whose value is below Rs. 2,000, except with his leave. There does not seem to be any limitation in England with regard to judgments in original suits, although there seems to be some provision in England with regard to interlocutory orders.

Order 58 provides for appeals from decisions of the High Court to the Court of Appeal. The special leave in cases of appeals from interlocutory orders has to be applied for in the Court of Appeals itself. (See Rule 15, Order 58.) If regard is had to the large percentage of decisions of single judges on the original side that are reversed in appeal, there is no reason to do away with the necessity of an appeal. Indeed, there is every reason to suppose that the judgment of the judge on the Original Side is likely to require revision in many a case. The conditions under which an original trial is conducted giving rise to the free play of passions and prejudices are not the best surroundings for a sound and impartial judgment, and if we take away the fear of an appeal which operates as a deterrent against error in many more cases than are really appealed against, the judgments of a single judge will be much more unsatisfactory than they are. The appellate judges with the whole evidence before them and with the consequent facilities to make a survey of the whole case are likely to arrive at a more correct conclusion in the case than the original judge recording evidence bit by bit with attention diverted from the real issues by circumstances of no real significance.

3. The third suggestion is that in suits exceeding in value Rs. 10,000, the trial should commence in the High Court itself. We do not see the object of this proposal. Now a District Judge or a Subordinate Judge tries the case, and on appeal the decision is heard by two judges of the High Court, from whose decision there is an appeal to the Privy Council if they disagree with the lower court, or there is a point of law. The change to the Original Side of the High Court does not involve an economy of judicial power, nor does it conduce to better justice. A transfer would be attended with great inconvenience to parties and witnesses who may be obliged to travel several hundreds of miles each time the case is adjourned, the languages of the witnesses cannot be accurately

understood, the dialectical differences being sufficiently marked on, and the witness himself dragged to a perfectly strange place, while, on the one hand, freed from the deterrent influence of that public opinion of his neighbours which is one of the best safeguards against falsehood, is on the other exposed to unsympathetic surroundings which will deprive the honest witness of that degree of nerve which is essential to a satisfactory performance in the witness box.

On the other hand, the provision contained in the Letters Patent seems to have been forgotten by the authors of this resolution. It provides for the High Court exercising extraordinary original jurisdiction in any mofussil centre (*vide* S. 31 of the Calcutta Letters Patent) somewhat in the nature of the circuit system in force in England. There is also the power both under S. 25, Civil Procedure Code, and under S. 13 of the Letters Patent to transfer to its own file any original suit pending in a mofussil court. Surely before the somewhat drastic remedy suggested in this proposal is adopted, the public is entitled to know what attempt has been made to give effect to these provisions. We can certainly imagine a Judge of the High Court sitting in Madura or Rajahmundry and trying a big zemindari litigation so as to set an example to mofussil courts as to how a great trial may be conducted by a judge with due regard to courteous consideration of points placed before the judge by the bar and the speedy disposal of vexatious litigation.

4. The next proposal is to require security for costs in appeal; and necessarily, when the appeal is from concurrent decisions of two courts. It seems to us that the powers possessed by the courts in this country in this respect are ample. To require security for costs compulsorily in all cases may be to deny justice in many. For it often happens that the poor litigant finds himself harassed by the weapons which the law has placed in the hands of his rich opponent, and to add to his troubles by compelling him to give security is practically to shut the door against appeal. A second appeal lies only on a point of law, and if the court will exercise the power conferred upon it by S. 551, there is no reason for a respondent being harassed by a vexatious appeal.

The next proposal is to restrict the scope of S. 622. That section has been already restricted by the decision of the Privy Council

in *Amir Hassan Khan* v. *Sheo Baksh Singh*, I. L. R., 11 C., 6, and the Madras High Court has placed an interpretation upon the words 'acting illegally' and 'with material irregularity' which confine their operation to cases where the judgment of the court below is perverse. It is difficult to deny that the High Court should have the power of interference even in such cases. One thing apparently that seems to have been forgotten is that the possibility of interference by a superior tribunal enforces a more careful disposal by the subordinate tribunal in all cases generally.

6. The next suggestion is apparently to widen the scope of S. 586 so as to deny the right of second appeal in some more cases than are within the definition of a small cause nature. There is perhaps no great harm in somewhat extending the class of cases that fall under S. 586 so as to include pecuniary claims, though enforceable against immoveable property. Unless any detailed suggestion is made, it is difficult to deal by anticipation with the possible extension of the scope of S. 586.

7. The next suggestion is to deny a right of second appeal on questions of procedure. S. 578 of the Code provides that a decree shall not be reversed by reason of a mere error of procedure. If it is remembered what a large percentage of the decisions reported in the Indian reports turn on questions of procedure, it will be impossible to put up with the large mass of error of which the Subordinate Courts are guilty and to rest content with the decisions arrived at betraying such ignorance of the rules of procedure. The moment that it is announced that no second appeals will lie on questions of procedure, the procedure of the Subordinate Courts will become less satisfactory than it is.

8. The next suggestion is to remodel the Presidency Small Cause Courts on the lines of the English County Courts and suggestion No. 9 is to confer on all Small Cause Courts the power to try all liquidated demands within the limits of their pecuniary jurisdictions. These two suggestions appear to have been made out of ignorance of the existing law. Though we are aware that there are differences as regards the scope of their jurisdictions between the English County Courts and the Small Cause Courts of the Presidency towns, there is no objection to assimilating the courts in

this country to the County Courts in England. Such a step will remedy one serious defect in the law as applicable to the Presidency Small Cause Courts, namely, the absence of the right of appeal on questions of law. It is competent to the Government to invest mofussil Subordinate Courts with jurisdiction up to Rs. 500 and Munsifs' Courts up to Rs. 200. This power may be fully and freely exercised.

In none of the suggestions we have dealt with above is there any real attempt to deal with the problem. The simplification of adjective law is a task to which the Legislature ought to address itself. A limitation law with various periods and starting points and a Code of Procedure which is full of difficulty to the practising lawyer in its interpretation add to the uncertainties of the law and are a disgrace to the statute book. If the appellate courts in the country were stronger than they are, there would not be any ground for complaint that the number of appeals is so large. It is highly incongruous that from the decisions of an experienced Subordinate Judge possessed of legal training, knowledge of the people and judicial experience, an appeal should lie to a District Judge deficient in all these qualities. The Legislature ought to step in and abolish the appeal from the Subordinate Judge to the District Judge and direct the appeal to the High Court itself in suits between Rs. 2,500 and 5,000 in value. That will reduce the number of appeals in such cases to one instead of two at present. The appeal will lie to a better tribunal, consisting of two judges instead of practically to an inferior tribunal and on questions of fact also. This will necessarily reduce the expense to parties in such cases. Moreover, the anomaly will be removed of the appeals in suits valued between Rs. 2,500 and 5,000 lying to the High Court in some districts and to the District Court in others according as there are no Subordinate Judges, or there are Subordinate Judges in the District.

It seems to us moreover that in all suits exceeding Rs. 1,000 in value appeals may lie directly to the High Court from the decisions of District Munsifs. This will bring the work of District Munsifs more under the eyes of the High Court, and thereby effect an improvement in the quality of their work and reduce the number of appeals in such cases also. The jurisdiction of District Munsifs

in Bengal is only up to Rs. 1,000, except when they are empowered to try suits of a higher value up to Rs. 2,000. There is no objection to District Munsifs trying suits between Rs. 1,000 and 2,500 if the appeal will lie directly to the High Court. Where District Munsifs try suits below the value of Rs. 1,000 as original courts, the appeal may lie to a court consisting of the District Judge and Subordinate Judge and the decision of this appellate tribunal where it agrees with that of the original court may be final. Unless the reform of the judicature of this country on the lines above indicated so as to strengthen the first appellate court is effected, it will be difficult to hope for much improvement in the quality of the judicial work. By our suggestions, we require an addition to the number of judges in the High Court, but they will relieve the subordinate tribunals of some portion of the work and place all subordinate tribunals under the immediate supervision of the High Court. The number of appeals will be cut down, and there will be a great saving of expense to the parties, but it may involve an additional expenditure to the country. The British Government in India whose chief title to recognition as a just ruling power consists in the purity, the impartiality and the justice of its judicial administration, will have earned an undying claim to the gratitude of the people by reforming its judicature in the spirit indicated by the foregoing suggestions. To be led away by a cry that the people are litigious and that appeals ought to be put a stop to somehow is not the spirit of British justice and is utterly at variance with the principles which regulate the system of judicature in England. There will no doubt be difficulties of detail in carrying out the suggestions we have made, but they are of no formidable character.

ILLATOM ADOPTION.

The term *illatakaru* means, according to Wilson, "a bride's father having no son and adopting his son-in-law." As pointed out by *Holloway*, J., in *Chella Papi* v. *Chella Koti*,* *illatom* adoption is a special custom which entitled a father-in-law to select a son-in-law who should take his property as if he were a son. The

* 7 M., H. C. R., 25.

custom amounts to a power of disposition inconsistent with the ordinary rules of law. Or as Mayne puts it (*vide* S. 190, A), it consists in the affiliation of a son-in-law, in consideration of assistance in the management of the family property. The custom prevails in the *Motati Kapu* or *Reddi* * caste in the districts of Bellary and Kurnool (*vide* I. L. R., 4 M., 272). It is also observed by the *Pedda Kapu* or *Reddi* caste in Nellore (vide *Balarami* v. *Pera*, I. L. R., 6 M., 267). The custom also appears to prevail among the *Nayudus* of North Arcot (*see Chengama Nayudu* v. *Munisami Nayudu*, I. L. R., 20 M., 75). In a case recently decided, it was held that the custom does not obtain in the *Konarazu* caste at Vizagapatam (*Narasimha Razu* v. *Veerabhadra Razu*, I. L. R., 17 M., 287). In an old case from Trichinopoly *Tayumana Reddi* v. *Perumal Reddi*, 1 M., H. C. R., 51, the District Munsif observes that the plaintiff was allowed to be the son-in-law of the deceased, and that the 4th defendant had admitted the existence among persons of the *Reddi* caste of the practice of constituting a son-in-law heir to the property of his father-in-law. But the High Court reversed the decree on the point that the alleged custom was not proved, and held that a father-in-law, although of the Reddi caste, cannot disinherit his heir in favor of his son-in-law.

It was pointed out by counsel in the case first cited (*Chella Papi* v. *Chella Koti*) and the suggestion was also agreed to by the Bench that the custom had its origin in the practice of appointing daughters. When the head of a family has no son to continue his lineage, but only a daughter, it is natural for him to keep the daughter in his own house even after she had been married (the son-in-law also becoming a member of his family), and to adopt the children born of her in preference to bringing in strangers. This practice obtains even now when a sonless man having a daughter is a wealthy person and an affectionate father. According to the ancient writers, her son became the son of her father if he had no male issue; and he became so, not only by agreement with her husband, but by the mere intention of her father, without any consent asked for or obtained. Hence Yajnavalkya † prohibited a man

* "The name of the principal caste of Telinga cultivators."—Wilson.

† Yajnavalkya, I., Ss., 52-3.
Gautama, XXVIII, Ss., 19, 20.
Manu, III, S. 11.

espousing a girl who has no brothers, lest her father should take her first son as his own. Vasishtha * states that a daughter who has no brothers reverts as a son to the family of her father. When a daughter is thus appointed, her husband will have to come and live in her family. Only a poor man would thus accept a position of dependence in his wife's father's family; and even a poor man would not willingly accept such a position, unless he is given some interest in his father-in-law's property. Manu † states that an appointed daughter is equal in all respects to a son and shares the family property equally with him. "The son of a man is even as himself, and as the son, such is the daughter." If the appointed daughter dies without a son, Manu ‡ goes on to state that her husband is entitled to her property. Thus it would be seen that sufficient provision was made for the son-in-law. But, now, in most parts of India including Bengal, a son-in-law is not recognized to possess any interest, either vested or contingent, in his father-in-law's property. However, there are usages to the contrary observed in some places. For instance, amongst the *Awans* in Sialkot, if the *Ghar-Jamai* (the name by which a son-in-law affiliated to his father-in-law's family is known in Northern India) has given up all claims to his father's property, he will retain his claim to the father-in-law's property, even if his wife die and he marry another. (*See* Tupper's Punjab Customs, Vol. III., 84, and Tagore Law Lectures for 1888, p. 456, &c.)

In the Madras Presidency, it is stated that this practice has assumed the form of *illatom* adoption. But the custom prevails exclusively among Sudras, and it may as well be doubted whether the practice of appointing a daughter referred to above was ever accepted by them. The custom is not resorted to for any spiritual purpose whatsoever. As pointed out by their Lordships in *Hanumantamma v. Rami Reddi*,§ it would seem that at the present day, temporal motives, the securing of assistance in the management of the family property and the provision of a protector in the event of the removal of the head of the house by death, induce the resort to the custom; and the circumstance that the son-in-law so introduced takes the place of the son on the devolution of the estate

* Vasishtha, XVII, S. 12.
† Manu., IX, Ss. 127-30, 134.
‡ Manu., IX, S. 135.
§ I. L. R., 4 M., 272.

may be explained by the suggestion that the inheritance is a consideration for services rendered and to be rendered.

The custom of *illátom* is different in many respects from the ordinary law of adoption. *Illatom* has for its basis no religious significance whatever. An adopted son passes out of his own natural family into the adopting family, so far as regards all rights of inheritance and the duties and obligations connected therewith; and adoption does not obliterate the tie of blood, or the disabilities arising from it. But in the case of *illatom*, the connection with the natural family is not necessarily severed and his rights of inheritance in that family continue to subsist. An adopted son becomes, in the strictest sense, a co-parcener (thus becoming subject to the doctrine of survivorship) and would take the property dscending to him as ancestral property; but the *illatom* son-in-law takes the property as his own self-acquisition and consequently with none of the restrictions or limitations attaching to ancestral property. An *illatom* son-in-law and sons of the father-in-law, though they may live in commensality, are not to be regarded as forming a co-parcenary, and there is therefore no right of survivorship. In competition with after-born sons, he does not take the share prescribed by law for adopted sons in the several schools, but shares with them equally, thus possessing higher rights than those of an adopted son. It is doubtful whether an *illatom* son-in-law may be taken when there is already a son; and an adoption may be made even during the existence of an *illatom* son-in-law.

No mention whatever is made concerning *illatom* adoption in any of the texts of Hindu Law. Our only authorities are a few decisions of the Madras High Court in which the alleged custom has been affirmed to exist. From what is pointed out above, it will be clear that no deductions whatever may be drawn by way of analogy from the ordinary law of adoption. *Illatom* is purely customary law; and like any other custom, it must be strictly proved by evidence. The well-known requisites of a valid custom must, amongst others, be proved to the entire satisfaction of the court. The custom set up must not have sprung from any agreement. As their Lordships said in the *Oorcad case,* * "What the law requires before an alleged custom can receive the recognition of the court,

* 3 M., H. C. R., 75.

and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class or district of country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty."

Next, as to the incidents of *illatom* adoption. It was laid down in *Hanumantamma* v. *Rami Reddi** that he who has at the time no son, although he may have more than one daughter, and whether or not he is hopeless of having male issue, may exercise the right of taking an *illatom* son-in-law; and it was considered unsafe to infer that the affiliation by *illatom* is analogous to adoption in any other respect, save in the circumstance that the *illatom* son-in-law is regarded for purposes of inheritance as a member of the family into which he is admitted. Mayne says that it seems uncertain whether such an affiliation can take place where there is already a son. Such a son-in-law stands in the place of a son and shares equally with him unlike an adopted son. The facts of the case material to our present purpose were as follows: One Linga Reddi had an *illatom* son-in-law and a son subsequently born. The son-in-law died leaving a son by name Rami Reddi and the subsequently born son died leaving a widow. The widow contended that Rami Reddi could only obtain the share prescribed by law for an adopted son. The High Court remarked that it could not be inferred from any similarity in his position to that of an adopted son that he would take the same share as an adopted son in competition with a natural-born son and held that he takes an equal share. It is not clear, however, whether in the life-time of his father-in-law, he enjoys the power of a son to demand partition.

The next question is whether the share so taken by the *illatom* son-in-law is to be treated as ancestral property in his hands or as self-acquired property free from all restraints on alienation which naturally attach to ancestral property. The point came for decision before their Lordships *Holloway* and *Innes*, J. J., in *Chella Papi* v. *Chella Koti*. After pointing out that the custom of *illatom* amounts to a power of disposition inconsistent with the ordinary rules of law, *Holloway*, J., raised the question

* 4 M., 272.

whether a person so coming in by exception to the ordinary rule of inheritance is thereby placed in the position of a son, who at his birth becomes a joint tenant with all the rights of such a son and with all the restrictions upon alienation which would exist as to his own son if it had been an estate of inheritance. He held that the *illatom* son-in-law is a *purchaser* within the meaning of that term according to English Law, that he does not and cannot stand in the same position as one who becomes a joint tenant at the moment of his birth, that he could not take the property as ancestral as it would be taken by an adopted son, and that he takes the property as his own self-acquisition, and consequently free from all restraints on alienation—conclusions in which *Innes*, J., concurred.

We have then to consider whether the property so taken by the *illatom* son-in-law descends to his own heirs, or to the heirs of the adopter. It has been decided that such property descends to his own heirs. (*See Ramakristna* v. *Subbakka*, I. L. R., 12 M., 442.) One Narasa Reddi who had admittedly been taken as *illatom* in the family of his father-in-law died leaving property which he had acquired by virtue of his *illatom* marriage. He was succeeded by his son, Pichi Reddi, who died without issue, leaving only a sister surviving him. In a suit brought by the natural brother of Narasa Reddi, who was the managing member of his family, to recover the property from the sister of the last holder, the District Judge framed the following issue: "Are the natural brother and nephews of an *illatom* son-in-law heirs-at-law of that *illatom* son-in-law's sons who survived him, in respect of the property of the family to which he was affiliated in preference to his daughter?" He recorded a finding in the negative and dismissed the suit. On appeal, *Parker*, J., said that, according to the ordinary rule of Hindu Law, his paternal uncles are nearer reversioners than his sister, and that it is for those who allege a special custom or a special arrangement at variance with the ordinary rule of law to prove the same and held that the *onus* of proving that the sister is entitled to the property fell upon her. *Shephard*, J., referred to an another incident of *illatom* adoption to be presently mentioned, *viz.*, that the *illatom* son-in-law does not lose his rights of inheritance in his natural family and said that from this it must follow that the members of his natural family must equally have such rights in respect of

property acquired by him as they would otherwise have had. It is no doubt hard that property belonging to one family should thus descend to persons who are outside the family altogether; but that is a necessary consequence of the alienation in favour of the *illatom* son-in-law. Consequently, it was held that the plaintiff was *primâ facie* entitled to recover, and the decree of the lower Court was accordingly reversed and the case remanded for trial on the merits.

Another question is whether after his affiliation in the family of his father-in-law, an *illatom* son-in-law retains his rights of inheritance in his natural family. The question was considered and answered in the affirmative. When the case * in which this point was decided came before the High Court, their Lordships *Innes* and *Muttusami Aiyar*, J. J., first remanded the case for a finding on the question "What effect, if any, the taking a son out of his natural family as an *illatom* son has upon that *illatom* son's rights of survivorship and succession in his natural family;" and directed that evidence be taken from Bellary, Kurnool, Cuddapah, Nellore, North Arcot, South Arcot and other Districts in which the custom prevails. Evidence, however, was not taken, as the plaintiff was unwilling to establish by further evidence the custom for which he contended. In the case in question, the *illatom* son-in-law, before he left his family, executed a written document renouncing his rights in his natural family. Their Lordships held that he was entitled to a share in the property left by his father's divided brother and observed: "The circumstance that a *karar* was considered necessary to preclude the first defendant (the *illatom* son-in-law) from succeeding in his immediate family is evidence that, without it, in the opinion of those concerned, he would have succeeded, notwithstanding the custom of *illatom*; and this tends to show that that custom does not affect existing rights of property of the person taken in *illatom*."

The last question which was considered and decided by the Madras High Court is this: Whether when an *illatom* son-in-law and an adopted (or natural) son live in commensality, they are to be

* I. L. R., 9 Mad., 114.

† I. L. R., 7 M. H. C. R., 25.

Balarami v. *Pera*, I. L. R., 6 M., 267.

regarded as forming a co-parcenary with its usual incidents. In an early case (*Mopur Andemma* v. *Dhamavarapu Subba Reddi*, S. A. No. 103 of 1868, 6 Mad. Jur. (1871), 59) decided by *Scotland*, C. J., and *Innes*, J., their Lordships held that there was co-parcenary, because the *illatom* custom was a mode of affiliation. But it should be noted that no evidence was taken in that case, and later decisions are in direct conflict with this decision. In *Chenchamma* v. *Subbaya* (I.L.R., 9 M., 114) the point arose directly for decision: one Ramanappa gave his daughter, Mangamma, in marriage to Ala Ayyanna and retained him as his *illatom* son-in-law. Subsequently he adopted a son, Venkataramanappa by name. It should be observed that this adoption was not at all questioned; and on the other hand it was treated as valid in every respect. This indicates that after the affiliation of an *illatom* son-in-law, the *illatakaru* can make a valid adoption). Ala Ayyanna had by Mangamma a son, Ramudu, and a daughter, Sitamma, and Ramudu had a son, Sitaramudu. Ala Ayyana's wife subsequently died, and after renouncing his *illatom* rights in favour of his son, he married another. Venkataramanappa, the adopted son, married Sitamma. (This shows that the daughters of an *illatom* son-in-law can validly espouse the sons of his father-in-law. If the *illatom* son-in-law is to be himself treated for all purposes as a son, then his daughter cannot certainly marry his would-be brothers). Venkataramanappa had by Sitamma one son, Punnayya, and one daughter, Chenchamma. Ramudu and Venkataramanappa died first and Punnayya died afterwards. Sitaramudu, the sole surviving male member of the family, alienated the family lands, and Chenchamma questioned the alienation. Both the lower Courts upheld the alienation as made by the sole surviving male co-parcener of a joint Hindu family, and it was urged in second appeal that Ayyanna having separated from his father-in-law, he could not assign his *illatom* right to his son, and that even if it was assignable, Venkataramanappa's adoption put an end to that right. *Muttusami Aiyar*, J., who took part in that decision, held that, as Ayyanna was taken as *illatom* before Venkataramanappa was adopted, the adoption could not devest any interest already vested in Ayyanna. This implies that the moment a person is taken as the *illatom* son-in-law of another, the former acquires a vested interest in the latter's property. The same learned Judge also held that it was competent to Ayyanna to renounce his *illatom* rights in favour

of his own son. With regard to the further question, whether the *illatom* son-in-law and the adopted son are to be considered as forming a co-parcenary, the same learned Judge observed: "The right of survivorship is an incident under Hindu law of co-parcenary, which is only possible between the male descendants of a common paternal ancestor, and in the absence of proof that it is also an incident of the *illatom* custom, we are unable to treat it as such, for the custom derogates from the Hindu law and the extent to which it does so must be proved like any other fact when it is disputed." An issue was sent as to whether there can be co-parcenary between an adopted son and an *illatom* son-in-law; but no evidence having been produced, it was held that in the absence of proof that the right of survivorship is an incident of the custom, it cannot be treated as such. It was accordingly decided that Chenchamma could recover a moiety of the lands and the alienation of Sitaramudu was to that extent set aside. This decision was followed in *Malla Reddi* v. *Padmamma*, I.L.R., 17 M., 48, in which it was clearly laid down that, according to the usage prevailing in the Nellore district, there is no right of survivorship as between an *illatom* son-in-law and the members of the family into which he is affiliated.

Another curious point arose for decision in a very recent case from North Arcot. (See I.L.R., 20 M., 75.) The facts of the case are as follows:—A Hindu, having two sons and an *illatom* son-in-law, divided the whole of his property between them, reserving no share for himself. A third son was subsequently born, and he sued for a partition of the property which had been already divided between his brothers (defendants Nos. 1 and 2) and the *illatom* member of the family (defendant No. 3). The Subordinate Judge found that the third defendant was a member of the family as he claimed to be and confirmed the decree of the District Munsif under which the plaintiff obtained a one-third share of the lands originally divided between the defendants Nos. 1 and 2. The High Court, while modifying the decree on another point, dismissed the appeal as against the third respondent with costs; that is to say, the subsequently born son was held to have no claims as against the *illatom* son-in-law. No evidence whatever appears to have been taken on this point, and the decision might be re-considered when a fresh opportunity offers itself. If this subsequently born son also had already

been in existence while the partition took place, he would also be entitled to a share, and the share of the *illatom* member would also be proportionately reduced. While the *illatom* son-in-law takes an equal share along with the other sons, it appears strange that a subsequently-born son should divest only the estate already vested in his brothers to the extent of his share and not also the estate vested in the *illatom* son-in-law; and there appears to be no reason why he should thus be more favorably treated. Take the case of a Hindu who dies leaving only an *illatom* son-in-law and a pregnant wife: Suppose a son is subsequently born: Now, the question is whether such a son can divest, at least to the extent of his share, the estate that has already vested in the *illatom* son-in-law? Take also another quite possible case. Though it is doubtful whether an *illatom* son-in-law can demand partition during the lifetime of his father-in-law, yet there is nothing to prevent the latter from coming to a partition with the former. Suppose such a partition actually takes place and the father-in-law reserves no share for himself: What, then, would be the position of a son subsequently born to him? Would he be entitled to demand a share from the *illatom* son-in-law? In the present state of the authorities, it is not possible to give definite answers to these questions.

To sum up what has been said concerning the incidents of *illatom* adoption :—

(i) For purposes of succession, the *illatom* son-in-law stands in the place of a son; and in competition with natural-born or adopted sons, he takes an equal share.

(ii) He takes such property as his own self-acquisition and therefore free from all restraints on alienation.

(iii) The property so taken descends to his own heirs and not to the heirs of the adopter (*illatakaru*).

(iv) He does not lose his rights of succession in his own family.

(v) An *illatom* son-in-law and an adopted (or a natural) son living in commensality do not form a co-parcenary, and there is no right of survivorship between them.

P. DURAISWAMI AIYANGAR.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER VI.

On Partible Property.

On this subject Kātyāyana says: "The wealth of the grandfather, the wealth of the father, and what they themselves had acquired must all be divided at a partition among co-heirs. After giving what has been given by the father out of affection, the remainder shall be divided. That shall be taken by the sons and by male issue in due order to the fourth degree."(1) *Commentary*—What they had themselves acquired except what belongs to any of them exclusively. 'Given out of affection, etc.,' means 'which the father had out of affection promised to give.' That must be given and the remainder only divided.' As the text says: "To three alone should libations of water be given and to three alone riceballs should be offered," he, who confers spiritual benefit by giving the *pinda* to the deceased, is entitled to share in the wealth of the deceased. Halāyudha holds that the expression 'to the fourth degree' refers to the person to whom the father made the promise of gift.

Nārada says: "In order that the father may not remain a debtor, the balance alone of the father's wealth left after paying his debts and discharging his obligations shall be divided by the brothers."(2) *Commentary*—'His obligations' means 'money promised to another by the father.' Prakasakara reads: '*Pitridanebhyah*' for '*Pitridayebhyah.*' Even according to that reading the meaning is the same.

Kātyāyana says: "At the time of partition all the debts which have been contracted by the brother, the paternal uncle and the mother for family benefit should be paid by those who share the wealth. The debt must be paid to the creditor only where after dispute it is proved by evidence; but otherwise it shall not be paid."(3) *Commentary*—The meaning of this is where the debt contracted by the brother, etc., becomes a matter of dispute, it

(1) Cole. Dig., Vol. II, 478, CCCLXVIII, and 479, CCCLXIX.

(2) Narada, XIII, 32.

(3) Cole. Dig., Vol. II, 480, CCCLXXI.

shall be paid to the creditor only when after dispute arises it is proved by the creditor by evidence and not otherwise.

The same author says: "Debt contracted by the father, his own debt connected with the father's debt and the debt contracted by himself for family benefit; all these debts should be paid by him with his kinsmen when partition is made."(1) *Commentary*—'*Pitriyam*' means 'contracted by the father.' 'Connected with the father's debt' means 'incurred by himself to discharge the debt contracted by the father.' 'His own debt' means 'debt borrowed by him on account of the family as distinguished from the debt of the brothers, etc., spoken of in the previous verse, 'debt contracted by himself for family benefit.'

Again Kātyāyana says: "What has been given by one individual for religious purposes or out of affection and debts contracted by him for his own benefit shall not be divided (among all the heirs), if found to be so; for one cannot give away out of the paternal wealth."(2) *Commentary*—Kalpataru says, that whatever is given away by one co-parcener out of the common property for his own religious benefit and whatever is lent by him to another out of affection on his own responsibility shall be debited to him solely at the partition; for there can be no gift by one alone out of common paternal wealth. Prakāsakāra and Pārijāta, however, hold that the debt contracted by one of many for his own individual religious benefit, the debt borrowed by him and given to another out of affection, and the debt incurred by him for his own individual enjoyments; these three kinds of debt, when found to be so contracted, should be separated. They must be paid by him alone who incurred them and not by all out of the common paternal wealth. As a matter of fact all this is contemplated by the text, and it must therefore be construed to cover all these cases.

Again Kātyāyana says: "House, land and quadrupeds when discovered should be divided. If there be doubt that property has been concealed, an ordeal in that case is ordained."(3) *Commentary*—The word '*pratyaya*' means 'ordeal.' The meaning of this

(1) Cole. Dig., Vol. II, 480, CCCLXXII.
(2) Cole. Dig., Vol. II, 481, CCCLXXIII.
(3) Cole. Dig., Vol. II, 484, CCCLXXIV.

text is rendered clear by the following text of the same author. "Bhrigu has declared that household utensils, beasts of burden, milch cattle, jewellery and servants must be distributed (among the heirs) when discovered, and if concealed, the *cosa* is ordained."(1) *Commentary*—'Household utensils' means 'the mortar and the rest.' 'Workmen' means 'servants, etc.' The rest is perfectly clear.

Manu says: "Let the value of a single goat or a single beast with uncloven hoofs never be divided among them. Such a single goat has been ordained to the eldest alone."(2) *Commentary*—The odd sheep, uncloven beast, etc., should not be valued in money and the value divided. But they shall be taken by the eldest alone.

Here ends the chapter on Partible Property.

CHAPTER VII.

On Impartible Property.

On this subject, Manu says: "Property acquired by one's own learning belongs to him alone as also what was given to him by a friend, presented to him at his marriage, or along with the honey-mixture."(3) *Commentary*—Wealth acquired by learning and wealth received at the time of marriage will be subsequently defined. '*Mitram*' means 'received from a friend.' '*Madhuparkikam*' means 'given as a token of respect along with *Madhuparka* (honey-mixture).' 'All this solely belongs to him' means 'is not liable to be divided.'

Yājnavalkya says: "He who recovers property duly descended and taken away shall not be divided with his co-parceners; as also wealth acquired by learning."(4) *Commentary*—'Duly

(1) *Note.*—A *cosa* is one of the many ordeals recognized by Smriti writers and in vogue in former times. It consists in the suspected being made to drink of water in which a holy idol had been washed, the guilt or innocence of the suspected being judged by the visible effects caused by the drinking of such water. Cole. Dig., Vol., II, 484., CCCLXXIV.

(2) Manu, Chap. IX., 119.

(3) Manu, Chap. IX, 206.

(4) Yājnavalkya, Chap. II, 119.

descended' means 'descended from his ancestors.' He among the heirs who recovers such property taken away by others and not recovered by his previous ancestor from incompetence or other causes, shall not divide it with the other heirs. Here the author of the Mitakshara observes. 'This is allowed if permitted by the other heirs.' As regards the text of Hārita found in the Samhita which says that he who recovers singly and by his own pains, land lost by his ancestors, takes a fourth share of it, the others taking their due shares in the rest, it is unreasonable, the text not being quoted in Smritimahārnava, Kāmadhenu, Kalpataru, Pārijāta and other works.

Vyāṣa says: "Wealth acquired by learning or by valour or given out of affection by the kindred shall be given exclusively to him (the acquirer) at the time of partition. It should not be claimed by other heirs."(1) *Commentary*—'Acquired by valour' means 'gained in war and otherwise.' The meaning of the word 'Soudhāyika' will be explained in the text of Kātyāyana beginning with '*Oodaya*, etc.'

Gautama says: "A learned man if unwilling need not give the unlearned what he himself acquired."(2) *Commentary*—'Acquired by himself.' After this 'by his learning' is understood. 'Vaidyah' means 'learned man.'

Kātyāyana says: "Nothing shall be given to the unlearned by the learned out of the wealth acquired by his learning. But he must share it with such as are equal or superior to him in learning."(3)

Narada says: "A learned man shall not give to the unlearned a share out of his own wealth if it was not acquired by him with the aid of the paternal wealth."(4) *Commentary*—What is here meant is this. Where one having had food and raiment out of the common property and acquired learning, gains without the aid of the common property by his own learning, then he need not give wealth so acquired to one void of learning. But if the wealth was acquired with the aid of the common property by his learning, it should be given even to the unlearned. Where

(1) Cole. Dig., Vol. II, 444, CCCXLVI. (2) Gautama, XXVIII, 29.
(3) Cole. Dig., Vol. II, 449, CCCL. (4) Narada, Chap. XIII, 11.

there is no use made of the common property during the time of the acquisition of learning, then although the common property is made use of during the time of the acquisition of wealth, the learned man need not give anything to anybody else. But the wealth belongs exclusively to the learned man; for Vyāsa after saying that wealth acquired without the aid of the paternal estate is not liable to partition, says that wealth acquired by learning is likewise not subject to partition. Therefore, the impartibility, which will be predicated in the subsequent portion, of wealth acquired by learning applies to cases where wealth is gained by learning acquired without the aid of the common estate, even though during the acquisition of such wealth the common estate is made use of. This is also Halāyudha's rule. Prakāsakāra and others, however, say that the texts speak of wealth acquired by learning without any aid of the paternal wealth. That view is wrong; for it is impossible to speak of such wealth as being acquired both with and without such aid.

Nārada again says, "(Let the father distribute among his sons all property) except wealth gained by valour or belonging to a wife and the gains of learning; they have been declared to be not liable to partition as also what is given by the father out of pleasure. This rule also applies to any property given by the mother from affection out of her own wealth; (for) the mother is as competent as the father (to make gifts)."(1) *Commentary*—From the use of the expression 'her own wealth it follows that this text applies to cases of Stridhana.

Vyāsa says: "What is given by a paternal grandfather or by a father out of affection belongs to him (to whom it is given). That and also what is given by a mother shall not be taken from him."(2)

Yājnavalkya says: "Whatever other property a man has himself acquired without prejudice to the paternal estate and anything received from a friend or on account of marriage shall not be shared with co-heirs."(3) *Commentary*—The word 'other' means 'other than anything by a friend, etc.'

Manu and Vishnu say: "What one acquires by his own efforts and without detriment to the father's wealth, he need not if unwilling give (to his co-heirs)"(4)

(1) Nārada, Chap. XIII, 6 & 7. (2) Cole. Dig., Vol. II, 450, CCCLIV.
(3) Yājnavalkya, Chap. II, 118. (4) Manu, Chap. IX, 208.

Vyāsa says: "What wealth a man acquires by his own ability without the aid of the father's estate, he need not give to his co-heirs as also what he acquires by learning."(1)

Kâtyāyana says: "When a man acquires learning from another, living upon food supplied by a stranger and by learning so acquired gains wealth, such wealth is said to be acquired by learning. What has been offered as a prize and won by a display of learning should be regarded as the gains of learning. It shall not be divided at a partition. What is acquired from a disciple, by officiating as a *ritwik*, by asking a question, by solving a doubtful question, by display of knowledge, by victory in a controversy, and by reciting the Vedas with ability is declared to be the gains of learning. It shall not be divided at a partition. This rule applies also to arts and handicrafts and to the profits made by superior skill in them. The prize offered for and won by learning and money received from a person performing a sacrifice, and from a disciple, all this is declared the gains of learning. Whatever is not thus acquired is common property. Brihaspati says that money staked and won by man by defeating his foe in a controversy is wealth acquired by learning and not liable to partition. Wealth acquired by boast of learning, received from a disciple, or for services as a *ritwik*, Bhrigu calls the gains of learning."(2) *Commentary—'Pradyayana'* means 'superior recitation.' 'Profits, etc.,' means 'whatever is gained in excess of a reasonable price by the skill of the seller belongs to him exclusively.' 'Prize offered for and won by learning,' that is, "wealth acquired in pursuance of a challenge in the form 'he who recites this chapter or argues this disputed point without blunder shall take it' is the acquirer's exclusive property." 'Acquired by boast of learning' means "acquired by boast in the form 'I alone am skilled in this branch of learning.'"

Kātyāyana defines the wealth which is acquired by valour and therefore impartible, in the following passage: "When a person prepared to face a danger performs a heroic deed and the master well pleased at such action shows him a favour, whatever is so acquired is known as wealth acquired by valour. This is not liable to partition; likewise what is taken under a standard. Whatever is acquired in war by a man after putting the force of the enemy to

(1) Cole. Dig., Vol. II, 451, CCCLIV, 2. (2) Cole. Dig., Vol. II, 444, CCCXLVII.

rout and having risked his life for the sake of his master is said to be taken under a standard."(1)

The same author next defines what wealth acquired by marriage is partible. "What is received along with a maiden of equal class at the time of her marriage is considered as wealth received with the maiden, pure and conducive to prosperity. What is so received along with the wife should be considered as wealth acquired in marriage and all this kind of wealth should be regarded as useful in the performance of religious duties."(2)

Sankha and Likhita say: "According to Prajāpati there shall be no division of a house, waterpots, jewellery, concubines, apparel, water, pasture-ground and roads." *Commentary*—'*Vastu*' means 'house.' Whatever is made of metals, jewellery, that which is being worn. '*Anuyukta*' means 'enjoyed.' The meaning is that there shall be no division of women and apparel which had been exclusively used by one. '*Apramprachanavarthmana*' means 'drains or channels for the flow of water.'

Manu and Vishnu say: "Clothing, *patra*, ornaments, dressed rice, water, women, family priests and spiritual counsellors and pasture-ground, they declare not liable to partition."(3) *Commentary*—The word '*patra*' means 'money in the shape of bonds'; for Kātyāyana defines it as money in bonds; and Brihaspati also speaks of bonds minus debts. Halāyudha, however, interprets '*patra*' as 'vehicle.' '*Kritānnam*' is explained by Pārijata as 'cooked rice, etc.' 'Women' here means 'concubines'; for Goutama says, that there should be no division of concubines. '*Yogakshema*' means 'advisers, *purohits*, etc.,' because they exist for it. '*Prachara*' means 'the way for cattle to go by.' Prakasa says, that the word '*Yōgakshēma*' means 'any hereditary office held in the family of kings, etc.' Halāyudha, however, says, that the word '*yoga*' means 'boats, etc.,' and that the word '*kshema*' means 'fort, etc.'

Vyasa says: "A place of sacrifice, house, vehicles, dressed rice, water, and women shall not be divided among co-parceners, although they have descended from father to son for a thousand generations."

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(1) Attributed to Manu and found at p. 465, CCCLV, Cole. Dig., Vol. II.
(2) Quoted as the text of Manu, Cole. Dig., Vol. II, 463, CCCLVIII.
Cole. Dig., Vol. II, 468, CCCLXII.
(3) Manu, Chap. IX, 219.

(1) *Commentary.*—'*Kshetram*' means 'place of residence.' '*Patram*' according to Pràkāsakāra means 'vehicle.'

Kātyāyana says: "Wealth secured by documents or dedicated to religious purposes, water, wives, a corrody descended from ancestors, valuable apparel, jewellery and whatever is by its nature ineligible shall be assigned to the co-heirs to be enjoyed by them alternately for stated periods. Pasture-ground for cattle, the common way, clothing and anything else worn on the body and tools and appliances used in arts should not according to Brihaspati be divided. Bhrigu has declared that whatever be the customary law proved to be followed in a country, class or tribe or company of merchants, according to that law shall the distribution of heritage be made."(2) *Commentary*—'*Dhritam vastram*' means 'cloths of great value.' 'Worn on the body;' by this expression only things of small value are meant. 'Dedicated to religious purposes' means '*common to all*' or dedicated for the worship of the deity, such as bell, etc. The word '*Nibandah*' has already been explained. 'Ineligible' here means 'impossible physically to divide.' Halāyudha interprets the word '*Prayujya*' to mean 'outstanding debts.' Pārijāta explains the word to mean books of reference, etc., and says that they should not be divided even by fools. 'Tools for arts,' *i.e.*, brush, pencil, etc.

Brihaspati says: "Those who declared clothes, etc., indivisible have not properly inquired. The wealth of the rich depends on clothes and ornaments. Such wealth if not divided is not productive; nor can it be allotted to one alone. It should be intelligently divided, otherwise it would be useless. Clothes and ornaments are divided by selling them; bonds, by recovering the money lent; and cooked rice, by exchanging it for unprepared food. Water in a well or a pool shall be drawn and used as needed. Land and embankments shall be divided according to their respective shares. One woman (slave) shall be made to do duty at their houses according to their shares of inheritance. If there are many women, they shall be distributed equally. This rule applies to males (slaves) also. The emoluments of a hereditary office shall be divided equally. The pasture-ground shall be always used by the co-heirs according to their respective shares."(3) *Commentary*—'Unproductive' means

(1) Cole. Dig., Vol. II, 470, CCCLXIV. (2) Cole. Dig., Vol. II, 471, CCCXLV.
(3) Brihaspati, Chap. XXV, 79—84.

'being common and therefore useless to any.' It is impossible to allot all that to one co-heir. '*Yogakshemavatah*' means 'of the adviser, *purohit*, etc.' Here the liability of clothes, etc., of great value to partition is laid down. Therefore the texts of Manu and others speaking of the impartibility only prohibit the division in kind of clothes, etc., of small value; and also prohibit the division of clothes, etc., of great value in any mode other than the one here pointed out for their division. There is no contradiction between the various texts. Prakāsakāra, however, says that things of small value if worn on the person are not liable to partition, that much wealth existing in the shape of bonds, jewellery, elephants, etc., is certainly divisible and that the mode of their division is pointed out in those texts beginning with '*Madhyastitham*, etc.'

Kātyāyana next proceeds to state what kind of wealth acquired by learning is liable to partition. He says: "The wealth of brothers who acquired their learning in the family or from the father and wealth gained by valour are liable according to Brihaspati to partition."(1) *Commentary*—'In the family' means 'from the paternal grandfather, paternal uncle, etc.' The meaning is that wealth acquired by brothers instructed by these or by the father by mean of learning or valour is certainly divisible.

Narada says: "One who supports the family of a brother engaged in learning shall share in the wealth gained by such learning even if he is himself unlearned."(2) *Commentary*—'*Asrutah*' means 'unlearned.'

Manu says: "In property acquired by the eldest brother after the death of the father the younger brothers have a share, if they have been acquiring learning."(3) *Commentary*—This means 'where the eldest brother after the death of the father gains wealth by his own special learning, in wealth so acquired by the eldest he takes two shares, and the younger brothers one share each, if they had been acquiring learning.'

Manu again says: "But in the wealth acquired by the brothers, all unlearned, by their labour, it shall be equally divided, it being no patrimony. This is settled."(4) *Commentary*—The meaning is

(1) Cole. Dig., Vol. II, 448, CCCXLIX. (2) Narada, Chap. XIII, 10.
(3) Manu, Chap. IX, 204. (4) Manu, Chap. IX, 205.

that where all the brothers alike unlearned acquire wealth by agriculture, etc., then in that wealth which is not paternal their shares shall be equal and that there can be no deduction of an additional share allowed there on the ground of one having acquired the greater portion.

Gautama says: "Unlearned co-heirs shall divide their joint acquisitions equally."(1) *Commentary*—'Unlearned' means 'possessing no learning which would make that wealth exclusively the property of any one of them.'

Vasishtha says: "If one of the brothers has gained something by his own labour, he shall only receive a double share (in it)."(2) *Commentary*—If among many brothers one with the aid of the common estate acquires wealth by agriculture, etc., then he takes two shares and the rest one share each.

Vyāsa says: "Where one with the aid of carriage and weapons common to all gains wealth by valour, etc., all the brothers have shares in that wealth. He shall take two shares and the rest equal shares."(3) *Commentary*—This text must be construed to apply to cases of wealth acquired by learning, valour, etc., other than those previously defined.

Here ends the Chapter on Impartible Property.

CHAPTER VIII.

On Stridhana.

On this subject Manu says: "Never shall women secrete from the wealth of the family common to many or even from the property of her own family without the permission of her husband."(4) *Commentary*—From the use of the term 'family' it follows that family wealth is meant. From the wealth common to many, women should not take out anything without the permission of the owners. Similarly she shall not take out anything without the permission of her husband even from the wealth exclusively belonging to her husband independently of other members of the family.

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(1) Gautama, Chap. XXVIII, 31.
(2) Vasishtha, Chap. XVII, 51.
(3) Not found.
(4) Manu, Chap. IX, 199.

Manu and Vishnu say: "The heirs of a man shall not take any jewels worn by his wives during his lifetime. Those who take shall be degraded."(1). *Commentary*—Prakāsakāra says that according to *Medhātithi* even such jewellery as have been worn without the permission of the husband should not be taken by the heirs.

Apastamba says: "Ornaments belong to the wife as also wealth given her by her kinsmen. So some hold."(2) *Commentary*—The term used in the original means 'money received as *Yautaka* at the marriage.' The meaning is that this also belongs to the wife alone.

Nārada says: "What was given to the wife by the husband from affection, she may enjoy it as she pleases even when he is dead, or give it away except immoveables."(3)

Vyāsa in the following passage shows over what portion of the property given by the husband, the wife has independent power. "A share of the wealth amounting to two in a thousand shall be given to the wife. This and the wealth given her by the husband she may use as she likes."(4) *Commentary*—As it is said that the limit of the wife's share is two thousand panas, it follows that where property is inconsiderable, some trifle alone might be given. Some say that in the light of the text that what is self-acquired can be given away at pleasure. This text is intended to refer to common property. Prakāsakāra, however, says that when the wives of disqualified husbands entitled to be maintained are separated, more than a thousand panas should not be given to them.

Kātyāyana says: "What a woman receives whether after marriage or before it, in the house of her husband or father, from her brother(5) or from her parents is called a gift from affectionate kindred. As such wealth is given to women that they may live well with it, they have absolute power over it. The absolute power of women over *Saudhayika* is always proclaimed. They can sell it or give it away as they please even if it be immoveable."(6) *Commentary*—The word '*Patyuh*' should be read along with '*griha*' as 'husband's house.' 'From the brother or

(1) Manu, Chap. IX, 200. (2) Apastamba, II, 6, 14, 9.
(3) Nāradà. Not found. (4) Cole. Dig., Vol. II, 600; CCCCLXII.
(5) Some read 'husband' for 'brother.'
(6) Cole. Dig., Vol. II, 594; CCCCLXXV, 1—3.

parents' is only illustrative. '*Saudhayika*' is therefore property received by a woman before or after the marriage, in the house of the husband or her father, from her father or kinsmen.' '*Anrusamsyam*' means 'good-behaviour.' It therefore follows that such wealth is given to them by their parents, etc., for their good living and in order that they may not go hard for want of money. Thus in *Saudhayika* wealth the absolute power of women extends to immoveable property also; but in what is given to them by their husbands, their absolute power is only over properties other than immoveable.

Accordingly Kātyāyana says: "What a woman receives from her husband she may dispose of as she pleases after his death; but while he lives, she must preserve it or commit it to his family. A childless woman not violating the bed of her lord and obedient to her spiritual guide may calmly enjoy it till her death. The heirs shall take it after her."(1) *Commentary*—' What is received from a husband' includes all wealth which becomes hers by her relation to her husband. It is two-fold;—what becomes hers after her husband's death owing to non-existence of other heirs;—what becomes hers even during her husband's lifetime, because of her relation to him. The first kind of wealth, she may dispose of as she likes all but the immoveable; being near her *guru* and protecting inviolate the bed of her lord, she must pass her days. In respect of immoveable property, the author says: "She may enjoy it till her death and that after that the heirs shall take it." In regard to the second kind of wealth, she must preserve it while he lives. According to Prakāsakāra she must await the permission of her husband in spending it and thus preserve it. Halāyudha and Pārijāta, however, say that 'what is received from her husband' means 'the *stridhana* given her by her husband.' But as there are doubts (regarding the extent of the power of alienation by a wife) even with regard to the property which had devolved upon the wife from the sonless deceased, Prakāsakāra's exposition is satisfactory and is more in keeping with the context, the doubts referred to being pressing.

Manu says: 'All faithful wives must thus be taken care of, barren, childless, destitute of relatives, living at home while their husbands are abroad, or afflicted with distress. Those relatives who

(1) Cole. Dig., Vol. II, 595, CCCCLXXVII.

take the property of such women while they live, a virtuous king should visit with the punishment meted out to robbers."(1) *Commentary*—'*Vasa*' means 'barren.' '*Aputrah*' means 'whose sons are dead.' '*Nishkulah*' means 'whose kinsmen by the mother and the father are dead.'

Devala says: "A woman's livelihood, ornaments, *sulka* and gain are her own property; she shall enjoy it all herself. Her husband shall not take it when in no distress. If he gives it away in vain or consumes it, he should return it to his wife with interest. He may use her property to relieve a son *of his* distress."(2) *Commentary*—'*Vritha*' means 'what is given for her livelihood.' '*Labbiah*' means 'money received from kinsmen.' '*Sulka*' means 'money given to the maiden for the marriage.' When he takes the money under pretext of necessity and gives it away uselessly, or consumes it, then, it must be returned with interest. But to relieve a son of his distress, the property of the wife may be taken even without her consent.

Kātyāyana says: "Neither the husband nor the son, neither the father nor the brother, have power to enjoy or alienate the property of a woman. If any one of them takes by force her property, he shall be made to pay interest and punished with a fine. But if he consumes it with her consent affectionately given, he shall be made to pay the principal alone when he becomes rich (enough to pay). Whatever she affectionately places at the disposal of any of these, seeing him afflicted with disease, immersed in grief or oppressed by creditors, he may repay it to her at his pleasure."(3) *Commentary*—The meaning of the last sentence is that when a woman finding her husband, etc., afflicted with disease, etc., gives them any money out of affection, the husband and the rest shall return it at their pleasure.

Yājnavalkya says: "A husband need not repay his wife any portion of her wealth which he had taken in a season of drout for charitable purposes, whilst suffering from disease or while in duress."(4) *Commentary*—'Charitable purposes' where they are

(1) Cole. Dig., Vol. II, 598, CCCCLXXX.
(2) Cole. Dig., Vol. II, 597, CCCCLXXVIII.
(3) Cole. Dig., Vol. II, 594, CCCCLXXV, 4—7.
(4) Yājnavalkya, Chap. II, 147.

necessary. When he is rendered incapable of work owing to disease, he need not repay his wife her money which he had taken for curing himself of the disease.

Kātyāyana says: "If subsequently (to taking his wife's money, he becomes the husband of two wives and does not treat her with proper consideration, he shall be made to repay her even the money which she had given him out of affection. When no provision is made for her food, raiment and residence to the wife, she may by force take her own property and claim her portion from her husband or his heir. This is the law of Likhita. If she get all this, she must live in the family of her husband; but if afflicted with disease and despairing of her life, she may then go to the family of her father. A wife who acts adversely to her husband, is shameless, wasteful of property and bent on incontinence does not deserve to have *stridhana.* Wealth exists for sacrifice. Therefore wealth should be given to those who are virtuous and not to women, fools and vicious persons. The *stridhana* promised by the husband to the wife should be given by the sons as a debt. If she does not live in the family of her husband, she may live in the family of the father." (1) *Commentary*—When the husband does not treat with kindness the wife who gave him her money out of affection, or when no provision is made for her food, raiment and residence, then she may take by force her wealth which she had given to her husband, seeing him afflicted with disease, etc. The rule of the Sastras is that even when she could have all these without effort, she can still take by force the wealth she had given to her husband. When she gets the money, she must reside in the family of her husband. The meaning of 'she may then go, etc.,' is that if she be afflicted with dangerous disease, she may go to the family of her kinsmen.

Here ends the Chapter on Stridhana.

S. SITARAMA SASTRI.

(1) Cole. Dig., Vol. II, 599, CCCCLXXXI.

NOTES OF INDIAN CASES.

Lalji Mal v. Nand Kishore, I. L. R., 19 A., 332. The question is one of some importance. It has been held by all High Courts that where a decree in execution is one for sale of hypothecated property, a purchaser under a private sale from the judgment-debtor of the property was a representative within the meaning of S. 244. Where the purchase is not by private sale, but in execution of a decree for money, it was held by the Calcutta High Court in *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*, I. L. R., 16 C., 355, that the purchaser was not a representative. We do not think there is any difference between a purchaser of mortgage property, and the purchaser of property under attachment as regards the question of their being the representatives of the judgment-debtor. Nor do we think that there can be any difference between the purchaser at a private sale and the purchaser at a court sale, notwithstanding the decision in I. L. R., 16 C. Of course, if the decree be a simple money decree, the purchaser of the judgment-debtor's property, not under attachment, cannot be regarded as his representative.

Madhao Prasad v. Kesho Prasad, I. L. R., 19 A. 337. An application for execution when there is no judgment-debtor on the record is held to be infructuous for the purpose of keeping the statute alive. But if at the time of the judgment-debtor's death an attachment was subsisting, further proceedings are held to be in accordance with law even though the representatives are not brought up on the record at the time. This view was taken upon the supposition that the further steps on attachment are purely ministerial and therefore the absence of the judgment-debtor's representative does not vitiate the proceedings. We are unable to accept this view as regards the nature of the application subsequent to attachment. It would follow therefore that whether there has been attachment or not, any proceeding in execution without the representative of the deceased judgment-debtor on the record is void. But see *Samia Pillay* v. *Chockalinga Chettiar*, I. L. R., 17 M., 76, and *Bal Kishen Das* v. *Bedmati Koer*, *Ib*. 20 C., 388.

Siyadattun Nissa v. Muhammad Mahmud, I. L. R., 19 A., 343. It appears to us that *Banerji* and *Aikman*, J. J., have taken a very proper view of the provisions of the Limitation Act as regards the computation of the period of limitation where the time for presentation of an appeal expired on a day in which the court was closed. S. 5 provides that it may be presented on the day the court re-opens. Time required for obtaining copies of judgment and decree may be deducted

in the computation under S. 12. Where, therefore, the time expired on the re-opening day and on that day copy of judgment was applied for and the appeal presented some days afterwards on the day in which the copy was given, the appeal was held to be in time.

The Court of Wards *v.* **Venkatasurya Mahipati Ramakrishna Rao,** I. L. R., 20 M., 169. Whether the Privy Council is going to reconsider its decision in *Sartaj Kuari* v. *Deoraj Kuari*, I. L. R., 10 A., 272, is a question on which it is difficult to pronounce a confident opinion. An attempt will shortly be made, to show that it is inapplicable to impartible estates in the Southern Country. More than one case raising the question is now before the Privy Council. That that decision went against the received opinion of this part of the country and almost effected a revolution in the law applicable to impartible estates goes without saying. There have been numerous cases decided by the courts in this province which expressly or impliedly denied the right of the Zemindar to alienate the Zemindari beyond his life-time. But the attempt made in this case to distinguish testamentary disposition from alienation *inter vivos* is, we think, bound to fail. Whatever justification there may be in the historical development of the law of wills, there seems to be none in favour of such a distinction at the present day.

The plaintiff appears to have had serious difficulties in the conduct of his case. He could not prove the child to be supposititious without at the same time making the Raja a party to the fraudulent introduction of the child. If the Raja was a party to the fraud the disposition in favour of the *aurasa* son was in favour of a *persona designata* and not to one whose taking the estate depended upon the condition of his fulfilling the character of an *aurasa* son. The only hope for the appellant before the Privy Council appears to be in the possibility of his being able to induce the judicial committee to re-consider their position in I. L. R., 10 A.

Queen-Empress *v.* **Arumugam.** With all respect to the High Court of Madras, we cannot help regarding this decision as a most unsatisfactory one. The four Judges who constituted the Bench are divided equally on the question as to whether reports made by a police officer under S. 173 of the Criminal Procedure Code are public documents. *Davies*, J., who was one of the referring Judges but was not a member of the Full Bench agreed with *Shephard* and *Subrahmania Aiyar*, J.J., in the view that such reports are public documents. We suppose that the contrary opinions of *Collins*, C. J., and *Benson*, J., must be supposed to have prevailed under the provisions of the Letters Patent.

While there is no question that the opinion of the other Judges is entitled to greater weight as it has the concurrence of *Davies*, J., also, we think it is highly to be regretted that the majority should have come to a conclusion against the privileges of the subject to get copies of documents prepared under Ss. 157 and 168 of the Criminal Procedure Code. We have read through the judgments most carefully and we feel constrained to think that *Subrahmania Aiyar*, J., has taken the right view of the law. The documents in question seem undoubtedly to be "the acts or the record of the acts of public servants." There is one satisfaction that the Judges who formed the majority confined themselves to the statement that copies should not be given to the accused before the trial. But unless the documents are used in evidence we fail to see how the accused who was not entitled before trial could become entitled after the commencement of the trial.

Sri Raja Chelikani Venkataramanayamma Garu *v.* **Appa Rao Bahadur Garu**, I. L. R., 20 M., 207. That the succession of daughter's sons to the maternal grandfather's estate is to an obstructed heritage seems clear upon the authorities; and that such a heritage is taken as tenants in common and not as joint tenants seems to follow from the rule denying the right of survivorship to cases other than those of succession on an obstructed heritage. The learned Judges seem also to be right in holding that there is no presumption that the property obtained as obstructed heritage becomes joint property in the hands of persons who are capable of becoming members of a joint family.

Muthia Chetty *v.* **Orr**, I. L. R., 20 M., 224. This case raises an interesting question. A receiver realized rents due to a judgment-debtor and misappropriated the same without paying into court. The question is raised whether the claim of the decree-holder is *pro tanto* discharged. We agree with *Shephard*, J., in thinking that it is not. *Davies*, J., no doubt asks the question why while payment into court is a valid discharge, payment to the officer of the Court—the receiver—should not be. The only answer that we can give is that payment into court operates as a discharge by a special statutory provision. Payment to a receiver is not given that effect. It is no good arguing that the receiver is agent of the court or of the decree-holder. If the misappropriation has resulted in loss, there is no reason why it should fall on the decree-holder any more than on a judgment-debtor.

SUMMARY OF RECENT CASES.

Debtor and Creditor—Appropriation of payments.

Cory Brothers and Co. (Limited) *v.* The Owners of the Turkish Steamship "Mecca," [1897, A. C. 286.]

The law obtaining in England with respect to appropriation of payments made by a debtor to his creditor may be thus briefly summarized.

When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any such appropriation at the time of making the payment, the right of application devolves upon the creditor. It was at one time supposed that this right of the creditor must be exercised, either at the time of payment, or within a reasonable time thereafter. But it is now settled, that he can exercise this right at any moment before suit or by the suit itself, and he is not bound to declare his election in express terms. It was laid down in *Clayton's* case (1 Mer. 585, 608) that where an account current is kept between the parties as a banking account and neither party makes any appropriation at the time, "there is no room for any other appropriation than that which arises from the order in which the receipts and payments are carried into the account. Presumably it is the sum first paid that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other." In the first place this presumption will not arise unless there is a current account between the parties with a setting of one item against the other. Secondly, this is not a rigid rule of law that governs the application of money but only the presumed intention of the creditor whose right it is to appropriate. Consequently, even in cases falling within the rule in Clayton's case, the presumption may be rebutted by other evidence. But so long as the right rests with the creditor and his choice not determined by any such presumption as above stated "there is no room" in the words of Lord McNaghten "as it seems to me, for the application of rules of law, such as the rule of the civil law, reasonable as it is, that if the debts are equal, the payment received is to be attributed to the debt first contracted."

Tort—Action, cause of—Nervous shock.

Wilkinson *v.* **Downton** [1897, II, Q. B., 57, per *Wright*, J.]

The defendant in practising what he seems to have thought a joke upon her, came to the plaintiff one evening and told her that her husband who had gone to the races that morning had met with an accident in which he had both his legs broken; that he was lying at some public house at a distance; and that he had desired the defendant to request the plaintiff to go to him at once with a cab and some pillows to bring him home. These statements were false to the defendant's knowledge, and were made with the intent that they should be believed by the plaintiff. The result of this was that there was a violent shock to the plaintiff's nervous system, producing vomiting and other serious consequences. These consequences were not due to any previous ill health or weakness of constitution, and the plaintiff had no predisposition to nervous shocks. Under these circumstances *Wright*, J., held that the plaintiff was entitled to recover damages for injury to her health. The counsel for the plaintiff attempted to bring the case within the doctrine of *Pasley* v. *Freeman* (3, T, R., p. 51). But this contention was not upheld by the presiding Judge who was of opinion that to do so would be extending that doctrine. He however decreed for plaintiff upon another ground. He put it thus: "The defendant has, as I assume for the moment, wilfully done harm to the plaintiff, that is to say, to infringe her legal right to personal safety and has in part thereby caused physical harm to her." He then found that the defendant's act was plainly calculated to produce the effect complained of, that an intention to produce it must be imputed to the defendant and for the same reason held that the consequence was not too remote.

There is no doubt that the decision of the Judge is correct, but the reasons given by him for his decision seem rather questionable. It is clear that this cannot come under the doctrine of *Pasley* v. *Freeman* (3, T, R., 51), for in cases like this it will be impossible to find all the analogue of the various facts necessary to give a right to an action of deceit, and the Judge was therefore right in rejecting the argument based on that case. On the other hand the Judge seems to lay some stress on the word 'wilfully' and seems to add one more to the list of the exceptional class of torts going under the name of "malicious wrongs." To that extent the statement of the law by the Judge seems doubtful. The case is one exactly analogous to the tort known as assault—the mind being the part of the individual that is primarily affected by the defendant's acts instead of his body which is usually

the case in an ordinary assault. The Indian Penal Code has however excluded cases like this from the category of assault and criminal force (*vide* Ss. 349, 350, 351, Indian Penal Code) although if death ensued as a result of such act, the man will be liable for murder or culpable homicide, as the case may be, unless he brings himself within any of the exceptions (*vide* Ss. 93 and 201, Indian Penal Code). In all these cases there will always be a difficulty of proving whether the result was the natural and probable consequence of the defendant's acts and on this point "what is a natural and probable consequence" there seems to be a good deal of conflict among the decided cases.

Forfeiture of lease—Practice—Discovery.

Mexborough (Earl of) *v.* Whitwood Urban District Council, [1897, II, Q. B., 111, C. A.]

Where, in any action, an issue is raised for the purpose of obtaining judgment on the ground of forfeiture by the defendant, the court will not, with regard to that issue, make any order, either for the discovery of documents, or for the administration of interrogatories. The rule in this respect is the same as the rule of Common Law, that, where a common informer sues for a penalty, the courts will not help him in any way by their procedure. These two rules are part of the substantive law and are not merely rules of procedure.

The plaintiff sued the defendants to recover possession of certain premises demised on lease on the ground that the lease had been forfeited by breach of some covenant contained in the lease. The only question at issue in the action was, whether there had been a forfeiture by breach of the covenant? The plaintiff applied for an order for discovery of documents, and also for leave to administer interrogatories to the defendants.

Held: by the Court of Appeal that the rule of law as to discovery and interrogatories was the same with respect to cases of forfeiture as to cases of penalty, and that the plaintiff's application must therefore be rejected.

Ecclesiastical law—Superstitious reverence.

Great Bardfield (Vicar of) *v.* All having interest, [1897, Probate Division, 185.]

In this case an application was made to the Court to decree the grant of a faculty authorizing the vicar and the church warden of the parish of Great Bardfield, Essex, to restore the chancel screen of the

parish church by placing three figures upon it. The figures were those of Jesus on the Cross, of the Blessed Virgin, and of St. John. These figures had been removed at the general destruction of roods under Queen Elizabeth. It appeared from the evidence that in the absence of these figures the screen presented a maimed appearance, while with these the screen will be an object of considerable interest and beauty. The Chancellor granted the faculty, being of opinion that the erection of these figures was not likely to be abused by superstitious reverence being paid to it.

It is really a great boon to this country that Courts have no jurisdiction to try and decide religious matters and thus indirectly enforce particular religious convictions. Superstitious reverence, adoration, or worship, is interpreted by the courts in England not only to mean the limited idea of the figure itself being worshipped, but also the far more extended conception of worship, adoration, or reverence paid to the deity in presence of or before objects or figures. It is intended to include all and every form or degree of worship paid to the deity in which the figure is made to take a place or play a part. What a striking contrast between the West and the East in this matter, the one enjoining all worship through idols, while the other prohibiting every such worship.

Practice—Defence, frivolous and vexatious.

Remmington v. Scoles, [1897, II, Ch. D., 1, C. A.]

There is no doubt that a defendant is at liberty to put in a defence confined to denying the allegations in the statement of claim without stating any case of his own. But a court has always an inherent jurisdiction to prevent an abuse of its procedure, and if in any exceptional case it finds that the defence put in is a mere sham, it can reject the defence.

The defendant, a solicitor, with the sole object of hindering or delaying the plaintiff, delivered a statement of defence in which he either denied or refused to admit each and every one of the allegations in the statement of claim, but set up no case of his own. In previous proceedings in another action he had admitted upon oath several of the material statements which he now denied, and had not denied the others.

Held: by the Court of Appeal, confirming the decision of *Romer*, J., that the defence was sham and vexatious and that it was a fit case for striking out the defence.

Will—Precatory trust—Election.

In re: **William; Williams *v.* Williams,** [1897, II, Ch. D., 12 C. A.]

A testator gave the residue of his estate, both real and personal, subject to the payment of his debts with his wife Lucy, her heirs, executors, administrators and assigns absolutely "in the fullest confidence that she will carry out my wishes in the following particulars," *i.e.*, that she would maintain a policy of £1,000 on her life and belonging to her, and that at her death she would leave the moneys due under the policy and also the moneys payable under another policy of £300 on his own life to his daughter in trust for her sole and separate use. He appointed his wife and another person his executors.

Held: (by the Court of Appeals, *Rigby*, *L.J.*, dissenting) that the wife took the residuary estate including the two life policies as her absolute property without any sort of trust attaching to them, and that she was not put to any election as to her own policy.

JOTTING AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Roman Law Examination Guide, by W. Addington Willis, LL.B., published by *Butterworth & Co., 7 Fleet Street, E. C., London* (1897).

Legal Maxims (2nd Edition), by P. Srinivasa Rao, published by *Messrs. Higginbotham & Co., Mount Road, Madras.*

The Law of Torts, by *Ratanlal* and *Dhirajlal.*

The Albany Law Journal for August (*in exchange*).

The University Law Review for August (*in exchange*).

The Educational Review for August (*in exchange*).

The Calcutta Weekly Notes for August (*in exchange*).

The Green Bag for August (*in exchange*).

The Allahabad Weekly Notes from August (*in exchange*).

The Canada Law Journal for August (*in exchange*).

The Canadian Law Times for August (*in exchange*).

Can a Wife sue her Husband for Libel?

Mr. Justice Kennedy gave judgment at Liverpool last week in a case of *Robinson* v. *Robinson*, an action for damages for libel brought by a wife against her husband, in which Mr. Langdon was for the plaintiff and Mr. Jordon for the defendant. The case was tried at Manchester. The learned judge's written judgment contained the following: 'This is an action by a wife against her husband for libel. The facts of the case are not in dispute, and by consent the case was taken before myself without a jury. The plaintiff in September last obtained a separation order under the provisions of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39). After that time she lived apart, receiving from him under the order a weekly payment of 18*s.* Some time after the order had been made she accepted the invitation of a cousin, Mrs. Partington, who was the licensee of the Castle Hotel, Clitheroe, to come to reside with her there, paying nothing for her board and lodging, but giving at her will some help in the management of Mrs. Partington's business in the hotel. Whilst the plaintiff was living under the said circumstances at the Castle Hotel the defendant sent her by telegraph the three messages which are the libels complained of in this action. Of the defamatory import of these messages, which in disgusting terms imputed to her sexual immorality, there is no question, nor, inasmuch as they were telegraphic messages, is their any question as to publication. The plaintiff showed them after their arrival to Mrs. Partington, and that lady, although she was much attached to the plaintiff, felt obliged, after reading the third telegram, to ask the plaintiff to leave her house. The plaintiff thereupon commenced the present action against the defendant. She does not ask for substantial damages. Her aim is by obtaining an injunction to prevent the repetition of this injurious and insulting conduct on the part of the defendant. The facts are not disputed by the defendant. There is no justification for the libels. His defence to the action is that, in point of law, it is not maintainable. He contends that, as these libels are libels upon the plaintiff's personal character, and not in regard to her business or property, and as she is therefore not suing him "for the protection and security of her own separate property" within the meaning of the Married Women's Property Act, 1882, s. 12, the action is one of tort, which, as a married

woman, although separated from him by the magistrate's order, she cannot bring against her husband. I agree with the defendant's counsel that the plaintiff is not helped by the last-mentioned enactment. . . . . The question is this. Can the plaintiff, not being enabled to do so by the Married Women's Property Act, 1882, sue the husband for a libel? . . . . . . The inability in general of the wife to sue her husband for a tort is founded not merely upon a rule of legal procedure necessitating the joinder of the husband as a co-plaintiff, but upon the principle that husband and wife form in the eye of the law one person. This was expressly decided in *Phillips* v. *Barnett*, 45 Law J. Rep. Q. B. 277; L. R. 1, Q. B. Div. 436. Unless, therefore, this is affected by the peculiar position of the plaintiff as a wife who has obtained a separation order, the defendant is apparently entitled to succeed in the present action. Is it so affected? This depends upon the effect to be given to certain provisions of the Summary Jurisdiction (Married Women) Act, 1895, under which the separation order was made, and the Divorce and Matrimonial Causes Act, 1857. . . . . . A libel by a husband upon a separated wife must in most cases be especially injurious to her. In the absence of any authority, it appears to me, looking at the plain intention of the statute, to give the judicially-separated wife full power, as a *feme sole*, to protect herself by action against all wrongs and injuries. . . . I give judgment for the plaintiff, with costs, for 20*s*. as nominal damages, as she does not ask for substantial damages, and an injunction against the repetition of the libels complanied of.—*The English Law Journal.*

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A Legal Laugh.—The *Scottish American* tells a story of a cobbler who was sentenced by a Scottish Magistrate to pay a fine of half a crown, or, in default, twenty-four hours' hard labor. If he chose the latter, he would be taken to the jail at Perth. "Then I'll go Perth," he said, "for I have some business there." An official conveyed him to Perth, but when the cobbler reached the jail he said he would pay the fine. The Governor found he would have to take it. "And now," said the cobbler, "I want my fare home." The Governor demurred, but discovered there was no alternative; the prisoner must be sent at the public expense to the place he had been brought from."—*The Albany Law Journal.*

REVIEWS.

The Roman Law Examination Guide, by W. Addington Willis, LL.B., Bar.-at-Law, published by *Butterworth and Co., 7 Fleet Street, E. C., London* (1897):—This is a neat little book intended to help students to form an idea of the style of questions usually set in examinations in Roman Law and of the answers expected. The book covers the whole field of Roman Law except the law of intestate succession and the law of actions. The answers are clear and succinct and the book is very well adapted to the needs of candidates for examinations in Roman Law. Now that Roman Law is one of the subjects for the Law Examination in the Madras University, the book is likely to prove a great favourite with students in Madras.

The Madras Law Journal.

PART IX.] SEPTEMBER 1897. [VOL. VII.

THE LAW OF DISAFFECTION IN INDIA.

There has been no case in recent times which has excited such keen interest throughout the length and breadth of India as the recent trials for sedition in Bombay, and especially the case of Mr. Tilak. The prosecution of Mr. Tilak was the second of the kind in the country since the enactment of S. 124-A of the Indian Penal Code in the year 1870. The first prosecution undertaken by the Government under this section was in the case of the editor of the *Bangobasi* in the year 1893. The want of unanimity among the jury induced the Judge to discharge them, and an apology being made by the editor, the prosecution was withdrawn. But while the editor of the *Bangobasi* was a man unknown to fame, the name of Mr. Tilak has been familar to people throughout the country, and the high social position and attainments of Mr. Tilak have attracted a vastly greater amount of interest to his trial. Apart, however, from every circumstance of personality, Mr. Tilak's case is of the deepest interest in its bearing upon the question of the freedom of the Press. We have no intention of discussing the propriety of Mr. Tilak's conviction or the question whether he was really guilty of the charge laid against him. The larger question to our mind is, whether the interpretation of the law by *Strachey*, J., is correct; and we propose to deal only with the several questions of law raised in these trials. No question of law that has ever come before the courts has been so important as the one raised by these trials as to the meaning of the word *disaffection*. The question is one which vitally affects the liberty of the Press, and must, therefore, necessarily affect the progress of the country. But for our knowledge of judges in India and of the disposition of many of them to believe in their infallibility, we should find it difficult to understand how a question of such far-reaching consequences could be considered

not sufficiently important to merit the attention of an appellate court. We have known numerous cases in England in which, even when questions of comparatively much less importance arose, the judges have expressed a desire that their decisions should be carried up to higher tribunals and submitted to the scrutiny of the appellate authorities; and in cases in which no appeals lay, judges have often expressed a regret that their decisions were not open to the examination of higher tribunals. In the trial of criminal cases, doubtful questions of law are always reserved by the presiding judge, and these questions are argued before a bench of several judges. While an English judge welcomes criticism and examination of his judgments by an appellate court, there is nothing that a judge in India dislikes so much, as the possibility of a reversal of his judgments. Our Indian judges are also blessed with that happy frame of mind which seldom entertains a doubt. We must confess our inability to understand the refusal of *Strachey*, J., to reserve the points of law arising in the case for the opinion of the other Judges except on the supposition that, according to his opinion, the point was plain beyond all doubt, or was of no moment. As a matter of fact, however, the points arising in the case are neither free from doubt, nor unimportant. The refusal of the Advocate-General of Bombay to certify that the case was a fit one for review forcibly illustrates the utter inexpediency of an officer who is charged with this duty being requested by the Government to conduct prosecutions. It is hardly likely that a lawyer who has to conduct a prosecution, however fair-minded he may be, can keep his mind unbiased and preserve that judicial temperament which is necessary to the discharge of the duties imposed by S. 26 of the Letters Patent. Nor again can we understand the decision of the Chief Justice and the other two Judges of the High Court refusing leave to appeal to the Privy Council. The learned Judges point out, very properly, that it is only when an important or doubtful question of law arises, or when there has been a miscarriage of justice that an appeal to the Privy Council can be allowed. It is difficult to accept the opinion of the learned Judges that these conditions were not fulfilled in the case before them. The most singular part of the order of the learned Judges is that in which they say that it has not been alleged that there was a miscarriage of justice. Mr. Tilak's contention throughout was that

S. 124-A was not correctly interpreted by the Judge who presided at the Sessions, that according to a correct interpretation of the law his case did not fall within the terms of S. 124-A, and that he was improperly convicted. The petition for leave to appeal to the Privy Council set forth the various grounds of objection to the Judge's interpretation of the section, and we cannot see what other meaning can be put upon Mr. Tilak's petition, except that he contended that his conviction was not legal and just. Do the learned Judges require that it should be stated expressly in the petition that there has been a miscarriage of justice, and that it is not enough, if it can be gathered from the tenor of the whole petition? Is it possible that the Judges think that a conviction can be just without being legal? The only justice that lawyers and judges are concerned with is justice according to law, and a miscarriage of justice means a miscarriage of justice according to law. There are no doubt cases in which, notwithstanding some error, defect or irregularity of procedure, it is said that there has been no miscarriage of justice. But where it is alleged that the section creating an offence and making it punishable has been misinterpreted, the allegation, if well founded, goes to the very root of the case and proves a miscarriage of justice. The argument of the learned Judges displays a narrow-minded technicality altogether inconsistent with the dignity of the highest court in the land. Information has reached this country that the Privy Council have also refused leave to appeal, but the grounds of such refusal are not before us. Meanwhile, another decision has been passed by the Bombay High Court in the *Pratoda* appeal which, so far as one can gather from the newspaper reports, considerably departs from the view taken in the Tilak case. The same question has, we believe, been raised in an appeal from Moradabad to the Allahabad High Court, and it remains to be seen what view the Allahabad High Court will take.

The first question that we have to consider is, what is the construction to be placed upon S. 124-A of the Penal Code. The section runs as follows:—

"Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite feelings of disaffection to the Government established by law in

British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added or with fine."

"*Explanation.*—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause."

We shall dispose of the simplest question first. Though the word *Government* is defined in S. 17 of the Code as denoting "the person or persons authorized by law to administer executive government in any part of British India," we do not think that in the words "*the government established by law in British India,*" it bears that sense. It would be unusual to speak of a person as established by law, and the word *government* can only refer to the *system* of government, apart from the men composing it. The disaffection contemplated by the section is not a disaffection to individuals merely, however high-placed they may be, but a disaffection to the existing political system of the country.

The next question is, what is meant by *disaffection*? *Strachey*, J., defined *disaffection* as meaning simply the absence of affection. This definition, however, he was obliged to confess, was wrong, as will appear from the order of the three Judges who disposed of the application for leave to appeal to the Privy Council. Then, he stated that *disaffection* meant hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. The learned Judge further said that the amount or intensity of the disaffection was absolutely immaterial, except, perhaps, in dealing with the question of punishment. It appears to us that this definition proceeds rather upon the etymology of the word than upon its established popular and technical acceptation. As Mr. Pugh pointed out in his speech for the defence, the only two matters in regard to which the word *disaffection* is used are with reference to regiments and to the relation between the subjects and the Government. A regiment is said to be disaffected when the men are not disposed to obey lawful orders, or are ready to desert and to go over to the enemy; and

subjects are said to be disaffected, only when they desire to resist or subvert the Government. The word *disaffection*, as used in this section, denotes, in our opinion, a state of mind among the people or any class of them in which they are not disposed to obey the authority of Government, or to support the authority of Government against attempts to subvert it. But even supposing that the word *disaffection* can possibly include any form of dislike or ill-will, it is restrained by the language of the explanation, that such feelings only amount to disaffection, as are incompatible with a disposition to render obedience to, and to support the lawful authority of, the Government against unlawful attempts to subvert or resist that authority. The most grievous mistake committed by the Judge consists in treating of the amount or intensity of the disaffection as absolutely immaterial and in treating the explanation as an exception with a strictly defined and limited scope. The view taken by the learned Judge is not merely logically incorrect, but lands him in anomalies and inconsistencies, and the privileges conceded by him as well as everybody else to what he calls honest journalism are not strictly reconcilable with his interpretation of the law.

The learned Judge lays stress upon the word *measures* found in the explanation. The learned Judge holds that if a writing cannot be said to be a comment on the measures of Government, the explanation is altogether inapplicable, and that it will fall within the first part of the section, if it is calculated to excite any feeling of dislike or ill-will, however mild, towards the Government. If the writing instead of commenting upon the measures of Government contains reflections upon the Government itself, its existence, its essential characteristics, its motives or its feelings towards the people, it is held to be outside the protection granted by the explanation. In construing the explanation, the first thing to be considered is what is meant by *measures*. The word is defined in Webster as "a step or definite part of a progressive course or policy; a means to an end; an act designed for the accomplishment of an object." Does the word *measures* include institutions or not? The learned Judge himself concedes that the explanation would protect criticism of institutions. According to the ordinary acceptation of the term *measures*, it would not include institutions. It may, perhaps, be said that institutions are in many cases the results

of past measures, and therefore fall within the scope of the explanation. But there are cases where institutions have existed from time immemorial and cannot be directly traced to any measures. Can such institutions be said to be outside the scope of the section? Suppose a writer criticises the present constitution of the service in any particular department and the efficiency of the members of that service as a body and finds fault with the Government for permitting such a state of things, can it be said that, inasmuch as it is a criticism of men as distinguished from measures, it falls outside the explanation? Again, suppose the Government omits to take the necessary steps for the suppression of plague or famine, and such omission is criticised, can the omission to take measures be itself regarded as a measure of Government? It would be an abuse of language to speak of omissions as measures, and yet no one can deny that a journalist has a right to condemn the Government for such omissions and would be justified in blaming the Government for its indifference to the welfare of the people. It is clear from the cases we have mentioned, either that the word measures must be construed in a loose sense so as to comprehend anything and everything, or that the explanation must be taken as only illustrative of the classes of cases which will not fall within the first part of the section. It seems to us that the more proper construction is to treat the explanation as only illustrating the classes of cases which would not amount to disaffection. It is probable that the word *measures* was used in the explanation, because criticisms of measures were more common than criticisms of men or institutions. But at the same time, it is clear that no emphasis could have been laid on the word *measures*. This will be clear if the explanation is put in the positive instead of the negative form. Put in the positive form, the explanation will read: 'Such a disapprobation of the measures of Government as is incompatible with a disposition to render obedience to the lawful authority of the Government, etc., is disaffection. Therefore, the making of comments on the measures of Government with the intention of exciting this species of disapprobation is an offence within this clause'. If a person expresses disapprobation of the men constituting the Government or their motives or the institutions of Government, and such disapprobation is incompatible with a disposition to render obedience to the Government, the disapprobation

would not fall within the explanation in this form and would not therefore, according to the reasoning of *Strachey, J.*, amount to disaffection, even though the disapprobation might be incompatible with a disposition to render obedience. But this conclusion will not, we think, be admitted by the learned Judge, and it can be denied only on the supposition that no stress is to be laid on the word *measures.* The conclusion that we have pointed out is at least as good a logical inference from the explanation as the conclusion of *Strachey, J.*, and amounts to a *reductio ad absurdum* of the learned Judge's view. Simply because a particular kind of disapprobation is pronounced to be not disaffection, it does not logically follow that all other kinds of disapprobation are disaffection. We are, therefore, led to the conclusion that the language of the explanation must be taken to be co-extensive in its scope with the language of the first part of the section. If the section is qualified by the explanation, a person will not be guilty under the section, unless the feelings of disaffection excited or attempted to be excited would be incompatible with a disposition to render obedience to the lawful authority of Government and to support that authority against unlawful attempts to subvert or resist it. If the section is interpreted in this way, there is no vagueness or uncertainty about the amount or intensity of the feelings of disaffection which should be created in order to render a person liable under the section. Our construction is fully supported by the authority of that distinguished Judge *Sir James Fitz James Stephen*, perhaps the greatest authority in criminal law in this generation. The opinion of *Sir James Stephen* is, no doubt, not binding upon the courts, but it should certainly induce any judge to hesitate in coming to a different conclusion. In moving the final report of the Select Committee on the Bill to amend the Penal Code, *Sir James Stephen* pointed out that under the section 124-A, then proposed to be added, a person might say what he liked about Government measures or public men and might publish or speak whatever he pleased, so long as what he said or wrote was consistent with a disposition to render obedience to the lawful authority of Government. The same view was adopted by Sir Comer Petheram, the late Chief Justice of Bengal in the *Bangobasi* case (I.L.R., 19 C., 35, 44). In his charge to the jury, the learned Judge said, "If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are

addressed a disposition not to obey the lawful authority of the Government or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words, or any feeling of disaffection, in fact, produced by them". Suppose a writer in the Press complains of the oppressiveness of the land tax and points out that the administration of that department of revenue betrays an utter want of regard for the convenience or well-being of the people, but at the same time declares that notwithstanding its shortcomings, however serious, the British Government is the best for the country and that he would prefer it to any other Government, can he be held guilty of an offence under this section? If he is not guilty, would it make any difference if he did not expressly declare his preference for the English Government, but it could be reasonably inferred or implied? Such an implication may, we think, be fairly raised in the case of most of the criticisms, that appear in the Press about the Government.

Mr. Justice Strachey seems to think that there is a sharp distinction between disapprobation and dislike. But disapprobation in every form implies dislike. To say that you disapprove of a measure is to say that you dislike it. Dislike of a measure must be necessarily attended by dislike of the person responsible for the measure, in so far as that part of his conduct is concerned. If, notwithstanding our disapproval of a person's conduct in a particular matter, we like him, it is because our approval and appreciation of him in other respects are strong enough to overcome the dislike that is likely to be and is caused by his conduct in that particular matter. Our likes and dislikes to persons and institutions are extremely complex feelings and are generally the resultants of a variety of conflicting emotions. The creation of a feeling of dislike against the Government in any particular matter of administration must not be confounded with the creation of a dislike against the Government generally, or with the creation of a spirit of intolerance of the Government.

The view we have taken appears to us to be in line with the English authorities upon the subject and to be the only one

consistent with that freedom of the Press which is so essential to progress in modern times. If the language of the section were free from all doubt, there would certainly be no use in referring to the English decisions upon the subject. But when the language is open to doubt and admits of a wider or narrower construction, help may be fairly sought for from the English authorities.

In the English law the publication of anything calculated to excite disaffection is treated as a seditious libel. A seditious intention is defined as "an intention to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, her heirs, or successors, or the government and constitution of the United Kingdom as by law established or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or in State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects. An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or its constitution as by law established with a view to their reformation or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out in order to their removal matters which are producing or have a tendency to produce feelings of hatred or ill-will between classes of Her Majesty's subjects is not a seditious intention". Stephen's Digest of the Criminal Law, 5th Edition, Art. 95. It is clear from this definition that where the object of a publication is only to excite the people to seek by lawful methods the alteration of any matter in Church or State, it does not amount to a seditious libel and that it is only when people are counselled to have recourse to other than lawful methods that the publication will be held to be seditious. Stray passages can no doubt be found in some of the decisions which might suggest a wider interpretation of the term *sedition*. But, there can be no doubt that, if the decisions are read as a whole, they insist upon the necessity of the publication being calculated to induce people to have recourse to other than constitutional methods. In *Regina* v. *Collins*,

9 Car. & P., p. 456, *Littledale*, J., laid down that the people have a right to discuss any grievances that they have to complain of, but they must not do it in a way to excite tumult. The test adopted is whether the publication meant that the people should make use of physical force as their own resource to obtain justice and meant to excite the people to take the power into their own hands and meant to excite them to tumult and disorder. The two most recent cases, however, are the case of *Regina* v. *Sullivan* and the case of *Regina* v. *Burns*. In *Regina* v. *Sullivan*, 11 Cox's Criminal Cases, p. 45, *Fitzgerald, J.*, defined sedition at considerable length, and his language has been quoted frequently in subsequent cases: "Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices whether by word, deed or writing, which are calculated to disturb the tranquillity of the State and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection and stir up opposition to the Government and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war, to bring into hatred or contempt the Sovereign or the Government, the laws and the constitution of the realm and generally all endeavours to promote public disorder."

For instance, with regard to the administration of justice, a journalist is privileged to point out that the administration of justice is bad; but he should not use language which would indicate contempt of the laws of the land. What is condemned is the attempt to produce such a hatred or contempt of the laws of the land as might induce the people to take the law into their own hands or to refuse to obey the law. The learned Judge pointed out, "If the law of libel was carried out in the full strictness of its letter, it would materially interfere with the freedom of the Press. Hence, a great deal depends upon the forbearance of Government, the discretion of judges, and above all on the protection of juries.

For instance, it is open to the community and to the Press to complain of a grievance. *Well, the mere assertion of a grievance tends to create a discontent, which, in a sense, may be said to be seditious. But no jury, if a real grievance was put forward and its redress bonâ fide sought, although the language used might be objected to—no Jury would find that to be a seditious libel. It might be the province of the Press to call attention to the weakness or imbecility of a Government, when it was done for a public good.* How closely that trenches on the law of sedition. And yet such writing, when *bonâ fide*, would receive protection from a jury."

In *Regina* v. *Burns*, 16 Cox's Criminal Cases, p. 365, the law as laid down by *Fitzgerald*, J., in *Regina* v. *Sullivan* was adopted by *Mr. Justice Cave*, and the question which the jury were asked to consider was whether it was the intention of the accused to excite the people to violence to a breach of the law. It is thus clear that, according to the English law, the primary test of sedition is whether the writing complained of tends to produce a spirit of lawlessness or disobedience to Government. Though the offence of exciting disaffection against the Government is called the publication of a seditious libel in the English law, it is not really a branch of the law of libel. Seditious libel cannot be defined merely as libel directed against the Government. It is an offence falling under an entirely different category, under the class of offences against the State. A corporation as such cannot complain of an injury to reputation (*Mayor of Manchester* v. *Williams* [91] 1 Q. B. 94). A seditious libel is an offence against the State, not because it lowers the reputation of the State, but because it tends to produce a spirit of disloyalty likely to be subversive of the foundations of Government.

In a prosecution under S. 124-A, it is no doubt unnecessary to prove that feelings of disaffection were actually excited, as the section renders punishable even an unsuccessful attempt to excite. But as pointed out by *Mr. Justice Cave* in *Regina* v. *Burns*, the moral justification for a prosecution by the Government for this offence must be that it has excited such feelings. Of this, however, there was no evidence in the case of Mr. Tilak. There was absolutely no evidence to show that the unfortunate murders of Mr. Rand and Lieutenant Ayerst were in any way the result of the

articles complained of. In this connection we must express our disapproval of the reference by the learned Judge to those murders in his charge to the Jury for the purpose of showing the state of the country and of the time at which the articles were published. The articles were published on the 15th of June, and the murders were committed on the 22nd. If the Poona tragedy had occurred before the articles were published, the reference might be justified. Mr. Tilak could not be expected to have foreseen the events of the 22nd of June; and the knowledge of surrounding circumstances with reference to which Mr. Tilak's conduct should have been judged was his knowledge at the time of publication of the articles, and not at a subsequent date. We cannot help believing that this unfortunate reference must have seriously prejudiced the accused.'

Another question which arose in the *Vaibhava* case was whether evidence was admissible to prove the truth of the allegations of fact in the incriminated articles. It is true that in a prosecution for libel the truth of the imputation is no defence. It is equally true that in a prosecution for a seditious libel, the truth of the imputation is no defence. But it does not follow that the truth of the allegations in a seditious libel is irrelevant in evidence. If the allegation was in fact unfounded and proved to be so to the knowledge of the writer, would it not go a long way towards establishing the disloyal intention dealt with in the section? In the same way if the allegations related to real grievances, it would be an important element in determining whether the intention of the writer was not to call the attention of the Government in perhaps pointed language to the existing grievances, so that they might be redressed. A man who writes under the indignation of a real grievance might be excused for some strength of language which would not be permitted to a man without a grievance. The truth of the allegation would, to a considerable extent, tend to show that the intention of the writer was merely to secure the removal of grievances and not to produce disaffection. We do not say that it would necessarily establish the innocence of the writer, but it would be an important element in determining it. The refusal of *Strachey*, J., to let in evidence of the allegations made by the Vaibhava must be regarded as a blunder legally and politically, legally for the reasons we have already given, and politically because

it has led to an impression that the Government was not prepared to face judicial inquiry into its methods of administration of the measures for the suppression of the plague.

In conclusion, we cannot help expressing our regret that the trial of such an important case should have been entrusted to a comparatively inexperienced Judge, however learned.

ILLEGITIMATE CHILDREN.–

THEIR RIGHT TO MAINTENANCE UNDER THE HINDU LAW.

The law everywhere gives some rights to illegitimate children as against those who are responsible for their existence. The mother is always bound to maintain them; and the father too, whenever he can be ascertained. The principle underlying this rule is twofold: (1) The universally recognized rights of children as against their parents to be maintained, protected and educated by them are extended to bastards; for, though they are not looked upon as children for any civil purposes, yet the ties of nature should not be ignored and the support of the offspring by the parent is a matter of natural obligation (2 Stephen's Commentaries, 312): (2) Moreover, the enforcement of the duty to maintain one's dependents is a mode of preventing vagrancy, or at least of preventing its consequences (3 Stephen's History of the Criminal Law, 342). To make the law effective in this respect, a summary remedy is usually available to enforce these rights. [Criminal Procedure Code, ch. XXXVI, and the Vagrancy Acts (43 Eliz., ch. 2; 5 Geo. I, ch. 8; 59 Geo. III. ch. 12; 5 Geo. IV., ch. 83; 4 and 5 Will. IV., ch. 76; 31 and 32 Vict., ch. 122) in England.] No doubt, as pointed out by Mr. Stokes, vagrancy is not and never has been an offence in India (2 Anglo-Indian Codes, 29). But there is nothing to prevent the law from seeking to prevent or remove the causes that may lead to vagrancy without making vagrancy a crime. The Roman Law and the English Law recognize the right of bastards to maintenance by their parents (Hunter's Roman Law, 677; 2 Stephen's Commentaries, 312). The Hindu Law goes further and confers on the *dāsī-putra* of a Sudra the

right of inheriting to his putative father in certain cases, either because of the laxity of the marriage tie among Sudras (Mayne, s. 505), or because of the limited importance attached by them to ceremonial offerings (I. L. R., 12 M., 401, at 403); his rights, however, are naturally smaller than those of a legitimate son. The laws of the countries on the continent of Europe permit the legitimation of bastards by subsequent marriage with the concubine. The Roman Law recognizes two more ways of legitimation. The English Law regards children conceived out of wedlock as legitimate if born after marriage, but does not permit legitimation of the offspring properly so called, *i.e.*, after birth, except by a special Act of Parliament [Mackenzie's *Studies in Roman Law*, Part I, ch. VII; 2 Stephen's Commentaries, 299].

The following is the text of the Mitakshara on the subject:—

Rights of son by a Female Slave in the case of a Sudra's estate.

1. The author next delivers a special rule concerning the partition of a *Sudra*'s goods (Here comes Yajnavalkya's Text, *Slokas* 133*a* and 134) * * * * * * * * *

3. From the mention of a Sudra in this place, [it follows that] the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance. (*Colebrook's Mitakshara*, I, xii).

Among the three regenerate classes of Hindus, *viz.*, Brahmins, Kshatriyas and Vaisyas, illegitimate sons are entitled only to maintenance (*Raja Parichat* v. *Zalim Singh*, L. R., 4 I. A., 159; *Chuoturya Run Mardun Syn* v. *Sahub Purhulad Syn*, 7 M. I. A., 18). The Mitakshara puts in the qualification—"if they be docile." In *Hargobind Kuari* v. *Dharam Singh* (I. L. R., 6 A., 329), it is held that the right of illegitimate sons to receive maintenance depends on obedience to the head of the family, not on their age or capacity to earn. "Obedience" is defined to be such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong. The Madras High Court has held that an *anandravan*, whose right to maintenance does not differ from the right of a member of an ordinary Hindu family to a perception of some portion of the income of the family property,

could not be refused maintenance on the ground of misbehaviour. (*Putanvitil Teyan Nair* v. *Putanvitil Ragavan Nair*, I. L. R., 4 M., 171.) These two cases point to a distinction between the right to maintenance of an illegitimate son of a twice-born to whom the above text of the Mitakshara specially applies and the right of co-parceners to maintenance which, being a substitute during co-parcenary for the right to a share on partition, cannot be affected by any circumstance that cannot affect the larger right. The question, whether the right to maintenance of persons who are neither co-parceners nor illegitimate sons of a twice-born is controlled by any such qualification, suggests itself, but is touched by no authority. It is submitted that the text should be strictly construed and ought not to be extended to cases other than the one specifically dealt with by it.

The right of an illegitimate son to maintenance from the family property is a purely personal right and does not descend to his son. *Balwant Singh* v. *Roshan Singh*, I. L. R., 18 A., 253.

Whether an illegitimate son of a twice-born can be an heir by a special usage is an open question. In *Bhaoni* v. *Maharaj Singh* (I. L. R., 3 A., 738), such usage was set up by the defendant, the illegitimate son, against the claim of the plaintiff, the widow of the last owner. The High Court found against the custom, reversing the finding of the Sub-Court. The same finding was arrived at in the only two other cases where the usage was put in issue. [*Mohun* v. *Chumun*, 1 S. D. 28 (37); *Pershad* v. *Mutiesree*, 3 S. D., 132 (176)]. Mr. Mayne seems to doubt the existence of any such exception by special usage. It would certainly require very strong evidence to make out such a custom which contravenes the general law.

The right of illegitimate children to maintenance, unlike the right of the *dāsī-putra* of a Sudra to inherit to his putative father, does not depend on the nature of the connection of which they are the offspring. Whether the connection is legal or illegal, they are alike entitled to be maintained, provided they are not entitled to succeed as heirs. Hence all illegitimate children of persons of the regenerate classes and the illegitimate children of Sudras, not being *dāsī-putras*, have a right to maintenance, even though the connection from which they sprung may have been adulterous or incestuous. (*Muthusamy* v. *Venkatasubba*, 2 M. H. R., 293; affirmed 12 M. I. A.;

203; *Chuoturya* v. *Sahub Purhalad,* 7 M. I. A., 18; *Rahi* v. *Govind,* I. L. R., 1 B., 97; *Viramuthu* v. *Singaravelu,* I. L. R., 1 M., 306; *Kuppa* v. *Singaravelu,* I. L. R., 8 M., 325; *Hargobind* v. *Dharam,* I. L. R., 6 A., 329; *Muthusamy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya,* 12 M. I. A., 203.)

The obligation to maintain illegitimate children seems to be limited to the case of their being infants. Their right cannot be put higher than that of a wife's son. The latter's right to be maintained out of ancestral property as long as the co-parcenary continues stands on a special footing. He can enforce partition at any time, but he may also sue for maintenance, if willing to continue as a member of an undivided family; and we say this with due deference to the Bombay High Court which has held that a co-parcener who is in a position to sue for a share of the family property cannot sue for maintenance (*Himmatsing* v. *Ganpat Sing,* 12 B. H. C. R., 96, *note; contra* Mayne, S. 416). In the absence of ancestral property, the legitimate son's right to maintenance stands on the same footing as that of the illegitimate son. The absence of co-parcenary rights in either case puts them on the same level. "Where there is no property but what has been self-acquired, the only parties whose maintenance out of such properties is imperative, are aged parents, wife and minor children." (The Mitkshara on Subtraction of Gifts.) It has accordingly been held that a father is under no legal obligation to maintain his adult son out of his self-acquired property (*Ammakkannu* v. *Appu,* I. L. R., 11 M., 91; *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh,* I. L. R., 2 B., 346, at 350), even though the son was labouring under a temporary illness (*Prem Chánd Pepara* v. *Hoolas Chand Pepara,* 12 W. R., 494). Likewise, an adult illegitimate son is not entitled to maintenance (*Nilmoney* v. *Baneshur,* I. L. R., 4 C., 91). *Hargobind Kuari* v. *Dharam Singh* (I.L.R., 6 A., 329) decides the other way. But the only ground on which the decision is based is that, as the Mitakshara declares an illegitimate son entitled to maintenance if he be docile, docility is the only qualification necessary to entitle him to maintenance. In *Kuppa* v. *Singaravelu* (I. L. R., 8 M., 325), though the case was one in which an adult illegitimate son got a decree for maintenance, the point as to his age was not taken, or decided.

Marriage between men of a superior caste and women of an inferior caste was sanctioned by the early Hindu Law. Such marriage being now prohibited, the issue thereof (*anulomajas*) would be illegitimate, as the *pratilomajas* or issue of a marriage between women of a higher caste and men of a lower caste have always been. (*Gooroodas Bannerjee's Marriage and Stridhan*, pp. 162-163; *Brindavana* v. *Radhamani*, I. L. R., 12 M., 72). There is nothing in the Hindu Shastras prohibiting intermarriage between persons belonging to different sub-divisions of the same caste. The Privy Council have accordingly held that a marriage between two persons of the Sudra caste was not invalid, because they belonged to two different classes or divisions of that caste, or because the wife was the offspring of a bastard (*Inderun Valungypooly Taver* v. *Ramaswamy Pandia Talaver*, 13 M. I. A., 141). The same view was taken in *Ramamani Ammal* v. *Kulanthai Nachiar* (14 M. I. A., 346) and *Upoma Kuchain* v. *Bholaram Dhubi* (I. L. R., 15 C., 708). As observed by *Holloway*, J., in 1 M. H. C. R., 478 (from which 13 M. I. A., 141, was an appeal), it seems to be clear that the classes among whom intermarriage is prohibited by the Shastras are the four classes recognized by Manu and not the infinite sub-divisions of these classes introduced in the progress of time. In Calcutta, it was at one time held that the general Hindu Law prohibits marriage between sub-castes, and such marriage could be valid only by a special custom (*Melaram Nudial* v. *Thanooram Bamun*, 9 W.R., 552; *Narain Dhara* v. *Rakhal Gain*, I. L. R., 1 C., 1.) But these cases are inconsistent with the Privy Council decisions cited above and have been practically overruled by *Upoma Kuchain* v. *Bholaram Dhubi*, I. L. R., 15 C., 708. It is no doubt true that certain sub-castes are very particular as to intermarriage with other sub-castes and try to avoid it as much as possible. But the presumption will be very strong against a custom which imports a restriction on marriage not contemplated by the Shastras and not free from objection on grounds of public policy.

In Malabar the members of a tarwad are entitled only to maintenance out of tarwad funds, except the Karnavan who is the manager of the tarwad property. The children of a mother governed by the Marumakkatayam Law are entitled to be main-

tained by the tarwad to which their mother belongs. But it seems customary for the father to provide for the maintenance of his children, though the law treats it as only a moral obligation owing to the absence of legal marriage in Malabar. In such cases it is doubtful if, according to Malabar Law, the children can legally compel the father to maintain them till they attain majority, at any rate when the woman's tarwad is possessed of no means and the father is in possession of self-acquired property. A Nair woman's children by a man of a lower caste are treated as illegitimate and are not members of the tarwad (Ramachandra Iyer's Malabar Law, §§ 292-293). The children of a Nambudri Brahmin by a Nair woman kept by him would be his illegitimate children. The Hindu Law does not govern Malabar people, and the rights of illegitimate children to maintenance by the putative father will be governed by the Criminal Procedure Code, ch. XXXVI, unless the Malabar Law clashes with it.

The Criminal Procedure Code confers a statutory right to maintenance on wives and children who are unable to maintain themselves, whether legitimate or illegitimate, which right can be enforced in a summary way in a Criminal Court (s. 488) subject to the conditions therein provided. Illegitimate children, though the offspring of adulterous intercourse, are entitled to maintenance under the section (Weir, 1104). Does this provision confer any new right not already possessed under the law previous to the Code? In re *the petition of Luddun Sahiba* (I. L. R., 8 C., 736) answers the question in the affirmative. That case decides that, though under the law of the *Shea* sect of Mahomedans, a *mutta* wife is not entitled to maintenance, such a provision of the law does not interfere with the statutory right to maintenance given by S. 536 of the Code of Criminal Procedure (Act X of 1872). Considering that the object of the legislature in enacting the above section was to prevent vagrancy and its consequences, the decision of the Calcutta High Court seems to be right, since the result of the decision will be to carry out that object by filling up the blanks left by the law as it existed before the Act. But it must be noted, on the other hand, that a Criminal Procedure Code is a Code least likely to be intended to affect or create substantive rights, and Section 1 of the Code provides that, in the absence of any specific provision to the contrary, nothing in the

Act shall affect any special or local law in force at the time of the passing of the Act. The question will arise for decision with reference to the Malabar Law which does not confer any rights to maintenance on the illegitimate sons of a Nambudri Brahmin by a Nair woman as against the putative father and which is not certain as to the rights of children to be maintained by the father. No such question can arise with reference to the Hindu Law, as the section does not confer any other or larger right to maintenance than that already recognized by that law.

An illegitimate daughter is entitled to maintenance and marriage expenses, (*Salu* v. *Hari*, Bom. H. C. P. J. F. for 1877, p. 34) which may be made a charge on the shares of both legitimate and illegitimate sons (*ibid.* W. and B., 432). It would seem that, as in the case of the sister and the daughter, her maintenance after marriage would be a charge upon her husband's family; but, if they are unable to support her, she must be provided for by the family of her father (Mayne, s. 408). In *Parvati* v. *Ganpatrao Balal* (I. L. R., 18B., 177), it is observed that the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the texts; and as the right to maintenance is laid down, in terms, in favour only of illegitimate sons, the proper inference from the absence of any express provision for daughters is that they were not contemplated as having the same right (*per Sargent*, *C. J.*, and *Bayley, J.*, at p. 183).

T. JIVAJI.

NOTES OF INDIAN CASES.

Perumal Ayyan *v.* Alagirisami Bhagavathar, I. L. R., 20 M., 245. We are inclined to question the correctness of this decision with all respect to the learned Judges who decided the case. A period was provided for the payment of the money and in the meantime on default of payment of interest, both principal and interest were payable on demand. Suit was brought within the period of limitation from the due date as specified, but after the lapse of the period calculated from the date of default in payment of interest. There was no demand made. The learned Judges hold the suit barred. They say the time began to run from the date of default in the payment of interest and not from the due

date as specified in the bond. There is no doubt that in the case of a promissory note or bond payable on demand merely, no demand is necessary to give rise to a cause of action and time runs from the date of the note or bond as specially provided in the Limitation Act. But where a time is specified and the right of action might accrue at an earlier date on demand, a demand is necessary to give rise to a cause of action. The principle of *Hanmantram Sadhuram Pity* v. *Bowles*, I. L. R., 8 B., 561, and *Ball* v. *Stowell*, *Ib.* 2 A., 322, applies to the present case.

Appa Rau Sanaji Aswa Rau *v.* Krishnamurthi, I. L. R., 20 M., 249. We regret that the learned Judges should have felt themselves bound to follow *Veeramma* v. *Abbiah*, I. L. R., 18 M., 99. We have pointed out already that the *ratio decidendi* in that case is unsound. See 5 M.L.J. 145. And, though the conclusion in that case was supportable on the language of S. 7 of the Act, there is no similar restriction in the case of S. 5. There is very good reason, therefore, for holding that S. 5 may apply to a suit brought under S. 77 of the Registration Act.

Arumugam Pillai *v.* Arunachalam Pillai, I. L. R., 20 M., 254. Where a will is presented for registration after the death of the testator by his representative, the question arises whether the registering officer is at liberty to refuse registration on the ground of minority or lunacy of the testator, as authorized by S. 35 of the Act, in the case of documents generally. We are disposed to think with the learned Judges who decided the case that S. 41 of the Act which authorizes registration in the same manner of any other document only deals with the form of registration. The rules to be followed by the registering officer in determining whether registration should be allowed or not, are only those which are contained in S. 41. The registering officer has of course to be satisfied that the will was executed by the testator. It may be said that, unless the provisions of S. 35 are applied, there would be no provision for a registering officer making any enquiry whether the testator himself presents it for registration, and that if in that case S. 35 is to be applied so as to empower the officer to refuse registration if the testator appears to be a minor, an idiot or a lunatic, it may similarly have to be extended to the case where the representative of a testator presents a document for registration. It seems, however, that the power to determine whether the testator was a conscious agent in the execution of a will may be supposed to be involved in cl. *a* of S. 41.

Hanuman Prasad Singh *v.* Bhagauti Prasad, I. L. R., 19 A., 357. The principles upon which this case ought to be decided are well set out by the learned Judges who decided it. But they appear to us to have

gone wrong in the application. *Nobin Chunder's* case, 9 W. R., 505, approved by the Privy Council in *Srinath Kur* v. *Prosunno Kumari Ghose*, L. R., 2 I. A., 113, undoubtedly lays down the correct principle. But where the learned judges appear to us to have gone wrong is in supposing that the property alienated by the widow was not held by the alienee adversely to the daughter. It is true no doubt as regards the alienor that the property is not possessed by the alienee adversely, but under a derivative title. As regards the daughters who were the lawful successors to the estate, the possession of the widow's alienee was adverse just as much as if it was held by a trespasser against them from the moment of the death of the widow. The daughters' right, having become barred prior to the coming into force of Act IX of 1871, that right could not be revived by virtue of that Act; and as a result of the *Shivaganga Case*, which was also followed in *Mussummat Lachhan* v. *Anant Singh*, 22 I. A., 25, the daughters represented the estate, and when their right was extinguished, the right of the male reversioner was also extinguished. If the right of the daughters had not become barred when Act IX of 1871 came into force, it might well be contended that the male reversioners had 12 years from the death of the last female heir. It is unfortunate that the decision in *Sambasiva* v. *Raghava*, I. L. R., 13 M., 512, which was overruled on review, was not brought to their Lordships' notice, the decision on review not having been reported in the Indian Law Reports. See, however, 1 M. L. J. 392. That was an exactly similar case, and the possession of the alienee was rightly held to be adverse to the daughter, giving rise to a cause of action in her favour which became extinguished on the lapse of the statutory period. The decision in *Drobomoyi Gupta* v. *Davis*, I. L. R., 14 C., 323., is also based on the same principle. It is difficult to see why the possession of the alienee should be otherwise than adverse to the daughters who succeeded to the inheritance.

Balmakund *v.* **Sangari**, I. L. R., 19 A., 379. There is a very considerable misapprehension as to the true scope of S. 43 of the Code of Civil Procedure. It has nothing to do with suits against different defendants. It requires the whole of the claim in respect of the cause of action against the same respondents should be made once for all. Where the suit is first brought against one defendant and afterwards against another even upon the same cause of action, S. 43., does not bar the institution of the suit. No doubt where the defendants are jointly liable upon a cause of action, the rule in *King* v. *Hoare*, 13 M. and W. 494, followed in several subsequent cases, precludes a second action against some of the persons so jointly liable. But that is not S. 43; nor does the rule in *King* v. *Hoare* apply to cases other than those of joint liability.

The distinction was pointed out by *Hutchins* and *Brandt*, J. J., in *Umamaheswara* v. *Singaperumal*, I. L. R., 8 M., 376, though lost sight of in a recent-case by *Subrahmania Aiyar* and *Davies*, J. J. In the case under notice, the Full Bench of the Allahabad High Court point out the true scope of S. 43 of the Act, though in that case they speak of there having been more than one cause of action. Whether, the cause of action is one or more than one, there can be no doubt that S. 43, does not apply to suits against different parties.

Queen Empress v. Mannu, I. L. R., 19 A., 390. The question which was the subject for consideration in this case by the Full Bench is one of considerable importance. It is to be regretted there should be a difference of opinion on a point of such material importance in criminal practice. We had occasion to note a similar divergence of opinion in connection with the question as to whether the reports of Police officers are the acts of public servants or the record of their acts so as to fall within the definition of public documents in S. 74 of the Evidence Act. In the present case we are disposed to favor the view adopted by *Bannerji* and *Aikman*, J.J., that statements recorded under S. 161 of the Code of Criminal Procedure by a Police officer if entered in a special diary, are not previleged ; but the accused person or his agents are entitled to see them. The Calcutta High Court has adopted the same view as the Judges who formed the minority in the case under notice. We must, however, confess that there is considerable force in the argument of *Edge*, C.J., and the Legislature, which has the admendment of the Code under consideration, has taken up the matter. The bill if it becomes law will enforce the view of the Chief Justice.

SUMMARY OF RECENT CASES.

Solicitor and client—Compromise of claim without consent of party invalid.

Macaulay v. Polley. [1897, II, Q. B. D. 122, C. A.]

A solicitor engaged by a client to bring an action, cannot without the consent of the party compromise the action with the other party, before action is brought.

The action was brought to recover compensation for personal injuries sustained by the plaintiff. He engaged a solicitor to conduct his suit. The solicitor thereon, before any action was brought, entered into negotiations with the defendant, and agreed to accept a sum of 15 guineas in settlement of the claim. The money was not paid over to the plaintiff

and he never consented to the compromise. The plaintiff commenced the action, but a motion was made to stay proceedings on the ground that the claim of the plaintiff had been satisfied.

Held; by the Court of Appeal (confirming the decision of *Grantham*, J.,) that the solicitor had no implied authority to compromise the claim under the circumstances stated.

Marriage, nullity of—Fraud—Pregnancy of wife at the time of marriage.

Moss v. Moss. [1897, Probate Division, 263. The President.]

In this case the petitioner sought to have his marriage with the respondent declared *null* and *void*, on the ground that she was pregnant by another man at the time of the marriage and that without any neglect on his part, he had been induced to enter into the marriage by the fraudulent concealment by the respondent of her pregnancy. The President after a very elaborate disquisition on the subject of the essentials of a valid marriage found the law to be against the petitioner and said "I am sorry for the undeserved misfortune of the petitioner, but the petition must be dismissed."

The essentials necessary under the English law for the validity of a marriage, were thus stated by the President. "There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication, solemnisation, so far as the law deems essential. There must not be incapacity in the parties to marry, either as respects age or physical capability, or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others, renders the marriage void or voidable."

Often it is stated that a marriage is *null* and *void* if induced by fraud. But this statement has very many limitations. Although every marriage originates in a contract, what is effected is not a mere contractual relation but a status. Consequently, it would not be accurate to import the whole law of fraud, applicable to the formation and dissolution of ordinary contracts into the field of the so-called contract of marriage. The fraud, therefore, that is spoken of as a ground for avoiding a marriage is limted to such fraud as procures the appearance, without the reality, of consent, the simplest instance of such fraud being personation. In such cases the marriage is considered void, not because of fraud, but because of absence of consent. It should, however, be noted in this connection that the American Courts, which also base [their decisions on the common law of England have held a contrary view on this point.

Mortgage—Foreclosure decree—Redemption before date fixed.

Hill v. Rowlands. [1897, II. Ch. 361 C. A.]

In a foreclosure suit after judgment, the master, by certificate, found the amount due to the plaintiff on his mortgage for principal and interest up to the date of the certificate and for his costs, and also found the amount which will be due to the plaintiff for further interest up to the expiry of six calendar months from the date of the certificate, and appointed the last day of the six months for payment of the aggregate sum at the place and hour therein mentioned. After issue of this certificate the mortgagor applied to redeem before the expiry of the six months fixed in it, on payment of the sum found due for principal and interest up to date of the certificate, with subsequent interest up to date of payment only.

Held: by the Court of Appeal (confirming the decision of *Romer*, J.) that the rights of the parties are settled by the judgment, and that the mortgagor cannot redeem before the date fixed by the certificate on payment of a less sum than is named in it.

[In this country a similar decree is generally given under § 86 of the Transfer of Property Act, and it is highly probable that a similar construction will be put on the section.]

Navigable rivers—Foreshore—Right to fix moorings.

The Attorney-General at the relation of Alfred Harvey Moore and others v. Wright. [1897, II. Q. B. D. 318 C. A.]

At a particular spot in the river Thames where it is navigable, fishermen and yacht-owners have been mooring their crafts, not by casting an anchor and riding thereto, but by letting down and fixing wooden beams into the soil which form the anchor which holds the boat. These fishermen and yacht-owners have been from time immemorial using these moorings—using them when they came in, casting adrift therefrom when they went out, and when they came in again taking up the mooring as before. The lessee of the owner of the several fishery at the spot, who is *prima facie* owner of the soil underneath the fishery, attempted to levy a toll on these moorings, and on the fishermen resisting this, the lessee took the matter into his own hands, and while the crafts were lying at the moorings cut some of them adrift. In a suit by the fishermen for an injunction;

Held: that the owner of the fishery was not the absolute owner of the soil underneath, but that he is owner subject to the common law right of all the public frequenting the sea, to pass and repass and navigate over the place in question, and, as incident to that navigation, to anchor in the ordinary mode of navigation.

Solicitor—Partnership—Costs incurred—Liability of dormant partner.

Court. v. Berlin. [1897, II, Q. B. D. 396, C. A.]

The plaintiff, a solicitor, was retained to recover a debt due to a partnership firm consisting of three persons, the defendants. Two of the partners were dormant partners, their names not being published to the world as partners and they themselves not taking any active part in the management of the business of the firm. The plaintiff was actually engaged by Berlin, the active partner, to bring an action against one Hyman in the firm name for a debt due to the partnership, While the action was pending, the defendants dissolved the partnership, and the dormant partners retired from the business. No notice of the dissolution of the partnership was given to the plaintiff, nor did the dormant partners do anything by way of withdrawing the plaintiff's retainer. The plaintiff did not know of the dissolution, nor did he know originally of the existence of the dormant partners. The action ended in success to the partnership and subsequently the plaintiff brought this suit against the three members of the partnership for the amount of his bill of costs in the action. Two of the defendants who were the dormant partners contended that they were not liable in respect of any costs incurred in the action subsequently to the dissolution of partnership.

Held: that the dormant partners were liable to the solicitor in respect of costs in the action incurred subsequently to the dissolution of partnership.

Vendor and purchaser—Parol evidence to explain document.

Plant v. Bourne. [1897, II, Ch. D. 281, C. A.]

By a contract in writing the plaintiff agreed to sell to the defendant "at the price of £5000 twenty-four acres of land, freehold, and all appurtenances thereto at Totmonslow, in the parish of Draycott, in the county of Stafford, and all the mines and minerals thereto appertaining, possession to be had on March 25th next, the vendor guaran-

teeing possession accordingly." In an action for specific performance of the contract, the defendant pleaded that the contract was void for uncertainty as the twenty-four acres were not sufficiently specified. The plaintiff proposed to let in evidence to identify the particular plot. He proposed to let in evidence to show that he was owner of 24 A. 1 R., 26 P. more or less on the south side of the highway from Totmonslow, and that at the date of the contract the defendant knew of this, and that he actually went over to the spot and examined it before entering into the contract.

Held: applying the principle of *Ogilvie* v. *Foljambe*, (1817, 3 Mer. 53) and *Shardlow* v. *Cotterell*, (1881, 20 Ch. D. 90.), that the parol evidence adduced was admissible to show what was the subject-matter of the contract. The decision of *Byrne*, J., reversed.

JOTTING AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

Fisher's Law of Mortgage by A. Underhill, Fifth Edition, published by *Butterworth & Co., 7 Fleet Street, E. C., London* (1897).

A Full and Authentic Report of the Tilak case by Setlur and Deshpande, published by *The Euducation Society Press, Byculla*, Price As. 10.

The Albany Law Journal for September (*in exchange*).
The Educational Review for September (*in exchange*).
The Calcutta Weekly Notes for September (*in exchange*).
The Allahabad Weekly Notes for September (*in exchange*).
The Green Bag for September (*in exchange*).
The Canada Law Journal for September (*in exchange*).
The Canadian Law Times for September (*in exchange*).

A somewhat extraordinary decision was pronounced by the *Chief Justice* and *Shephard*, J., in a case that came before them in appeal from the decision of the District Judge of Madura. An election was held to fill a place on the Meenatchee Temple Committee of Madura. An unsuccessful candidate, not the person who obtained the next largest number of votes, or for that matter, even a considerable number, filed a suit for a declaration that the election was invalid owing to various irregularities and malpractices and for an injunction restraining the successful candidate from taking a seat on the committee. The plaintiff

confined his case and his right of suit to his character of candidate without basing it upon his character of worshipper or voter. The Munsif dismissed the suit holding that there was no cause of action, but the District Judge on appeal reversed the decison and remanded the case for disposal on the merits. The defendant appealed against this order to the High Court under S. 588, C.P.C. The learned Judges held the Judge was right. They said it was perfectly clear to them that the plaintiff had a right of action. We are however, unable to see this. The candidate who gets the next largest number of votes may sue to be declared elected and to restrain the successful man from taking his seat; or all the voters in whom the right is jointly vested may claim that the nominee of the majority shall be entitled to the seat or some of them obtaining leave under S. 30 may claim an injunction. But it is difficult to see how a candidate even in the character of worshipper or voter can sue to unseat the successful man. When it was argued that if such a suit were allowed there might be as many suits as there were voters fighting for the successful man or against him for contradictory relief, the argument was met with the singular observation that more suits meant more revenue to Government.

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A Novel Procedure:—These are days of surprises in our High Court. The other day in a suit tried *exparte* before *Mr. Justice Benson*, it appeared that the defendant though served with a copy of the summons had not been served with a copy of the plaint as required by law. The matter was brought to his Lordship's notice, but he passed judgment in plaintiff's favour directing at the same time that the decree should not be issued, until the defendant was served with a copy of the plaint. Was the defendant to put in his written statement after service of the plaint and for what purpose? What is to become of the answer of the defendant.

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Why inheritances descend and not ascend:—The quaint reason, given by Bracton and adopted by Lord Coke, why, by the Common Law, a father cannot inherit real estate by descent from his son, is that inheritances are heavy and descend, as it were, by the laws of gravitation and cannot re-ascend. (Co. Litt. 11. 2 Bl. Comm. 212).—*The Green Bag.*

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Who is the Villain:—Curran, the Irish Advocate, was one day examining a witness and failing to get an answer, said:—"There is no use in asking you questions, for I see the villain in your face,"

"Do you, sir? "said the man with a smile."

"Faix, I never knew before that my face was a looking glass."
—*The Green Bag.*

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Charles Dickens and his clock:—Dicken's Gadshill clock, lately sold in London, was the subject of the following letter from him to Sir. John Bennett.

My Dear Sir: Since my hall clock was sent to your establishment to be cleaned, it has gone (as indeed it always has) perfectly well, but has struck the hours with great reluctance and, after enduring internal agonies of a most disheartening nature, it has now ceased striking altogether. Though a happy release for the clock, it is not convenient for the household. If you can send down any confidential person with whom the clock can confer, I think it may have something on its works that it would be glad to make a clean breast of.

Faithfully yours.

CHARLES DICKENS,

The Green Bag.

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"*How came you here?*" Said the visitor to a prisoner in the penitentiary.

"I was brought here by my convictions," was the firmly spoken reply.—*The Green Bag.*

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We take the liberty of extracting the following article from the Albany Law Journal.

Duty and Liability of Attorney to Client.

THE relation of attorney and client is one of mutual trust, confidence and good will, and the fidelity of the attorney to the client involves the most difficult questions in the consideration of this subject. That he is responsible for the want of ordinary skill, care and reasonable diligence is well understood, as is also the fact that the skill required has reference to the character of the business undertaken, but it is extremely difficult to fix upon any rule which shall define negligence in a given case. The habits and practice of men are widely different in this regard. It has been laid down that if the average degree of skill and diligence could be determined, it would furnish the true rule. "God forbid that

it should be imagined that an attorney or counsel, or even a judge, is bound to know all the law," said Lord Tenterden. Naturally, the scope of moral responsibility of the attorney to the client goes further than mere legal liability, and embraces the entire devotion to the client's interests, zealousness in the maintenance of his rights, and the exertion to the utmost of his learning and ability, and by the use of these attributes alone can the conscientious attorney be satisfied. It is possible that an attorney will maintain, with great warmth and earnestness, the side which he must know to be unjust, and the success of which will be a wrong to the opposing party, and the attorney might be considered a participator in the injustice, but he cannot be held morally responsible for the act of his client in maintaining an unjust cause. The lawyer who would refuse to lend his professional assistance to a cause on the ground that, in his judgment, the case was unjust, would usurp the functions of both the judge and the jury. It might be well to quote here the words of Lord Brougham in his celebrated defense of the queen: "An advocate," said he, "in the discharge of his duty, knows but one person in all the world, and that person is his client. To save the client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy lot to involve his country in confusion." But an attorney owes the duty of good faith and honorable dealing to the court before whom he practices; he is an officer of the court, and it is his high vocation to correctly inform it as to the law and facts of the case, and to aid it in doing justice. He is not bound to suffer false and perjured testimony to be presented with the possible result of inducing the court to take jurisdiction where there would be otherwise no power to act, and to grant a judgment or decree which the law would prohibit were the real character of the testimony known. In resorting to deception or permitting his client to do so the attorney violates his oath of office. An attorney cannot disobey the express lawful instructions of his client, and he is liable if he negligently fails to bring suit, also if, through his negligence, the papers or securities of the client are lost; but where such papers are stolen from his office, he cannot be held responsible, unless through negligence on his part.

The attorney can only undertake to avoid errors and mistakes which any prudent practitioner would avoid; and where there is a reasonable doubt as to want of skill and diligence, he cannot be held liable, and the

error being such as a cautious man might fall into, he cannot, on that account, be deprived of his fee. If, however, the attorney disregards well-established and clearly defined rules of law, or ignores the ordinary rules of court and practice, pleading and evidence, sometimes even the right construction on cases free from doubt such as bringing an action of assumpsit on a deed under the commonlaw system; if his papers are defective through lack of diligence on his part or the part of his clerks, he will be liable; and the failure to deliver a *fi. fa.* to the sheriff, whereby a levy is lost, renders him liable. Where an attorney undertaking to search the records overlooks prior liens he is liable to his client who loaned money on a mortgage of property. It is not required that the attorney should assure a client as to the result of the proceedings which he has advised, and in an action for attorney's fees it is no defense that some other course than that advised by him would have been more advantageous to the client, it appearing that the attorney acted in good faith. An attorney who is employed to draw a will is not liable to a person who, through the former's negligence and ignorance in the discharge of his professional duties, was deprived of the portion of the estate which testator instructed the attorney should be given such person by will. Where the attorney allows a cause to be called for trial without previously inquiring whether a material witness was absent, and his client was non-suited, he is liable; also where he allows judgment to be taken for want of an answer, or where he fails to appear in court when the cause is regularly reached on the docket. Where money has been collected for the client, the attorney is bound to notify him of the fact within a reasonable time; and if he does so, the client has no cause of action against him until after a demand and a refusal to turn it over. An attorney for a decedent's estate who has collected money on a claim due on the estate while acting in the employ of the administrator cannot be compelled by the Probate Court to turn over such collections under the statutory clause providing for commitment to jail of any person who refuses to surrender property belonging to a decedent after the administrator has on oath sworn before such court that the attorney has such property in his possession. The suspension of the attorney is the proper remedy. The usual remedy of a client against an attorney for neglect or misconduct is by an action on the case; sometimes, however, the courts have interfered summarily, especially where the transaction appears tainted with fraud, or where the attorney having been paid fails to perform his duty, in which event he may be proceeded against by attachment. But without some showing of fraud the court will generally leave the client to his remedy by action. In equity a distinction is drawn between fraud and negligence,

and only where the former is shown, will a court of equity interfere. In all actions against attorneys for negligence, or for want of skill, when the facts are ascertained the question of negligence or want of skill is for the jury. The actual loss sustained and not the nominal amount directly involved is the measure of damages. In showing negligence the burden of proof rests primarily upon the plaintiff, and when established, it is for the attorney to prove that the client was not injured by it. Where the acts of the attorney, in the prosecution of his client's case, are *bona fide*, an action on the case will not lie; to sustain such an action it must be shown that the acts were malicious and without foundation. If an attorney commences a suit, knowing that there is no cause of action, "dishonestly and forsome sinister view, for some ill-purpose; or for some purpose of his own which the law calls malicious," and causes a party to be arrested and imprisoned, he will be liable therefor. * * * Every consideration should induce an honest attorney to regard himself, as far as the cause is concerned, as completely identified with his client; all selfish interests should be sunk by him in respect to his one great duty to his client, that of immovable fidelity.

MORTON JOHN STEVENSON,
in the Central Law Journal.

CHICAGO, ILL.

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A Legal Laugh:—"I thought you said your old horse was not worth $10,"

"Well, mebbe I did; but that was before he'd been killed by a railroad train." :—*The Albany Law Journal.*

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Edward Everett Hale tells in the Youth's Companion of James Russell Lowell's first client when he started in law. After Lowell had nervously given the client a chair, taken his hat, and sat down with his note-book to take notes on the case, he found that his visitor was a painter come to collect a bill:—*The Albany Law Journal.*

REVIEWS.

The Law of Torts by Ratanlal and Dhirajlal, published by *The Irish Presbyterian Mission Press, Surat.* Price Rs. 5 :—We are unable to see what use this book is intended to serve. It purports to be a digest of the Law of Torts containing extracts from various authors in that department of law. So far as we have been able to judge from a cursory perusal of the book, we are unable to say that there is anything original in it. Although it professes to be a book treating of the Law of Torts as applicable to this country, we find several statements in it which appear to be of questionable soundness in this country. It is said that a convict, whose sentence is in force and unexpired, cannot sue for the recovery of any property, debt or damage; that a wife cannot sue a husband for a tort, nor a husband his wife. The authors evidently appear to have had the law of England in their minds and not the law as applicable to this country. The authors appear to us, however, to have taken great pains in collecting a large mass of useful and interesting information.

Legal Maxims by P. Srinivasa Rao, 2nd edition, published by *Higginbotham and Co., Madras.*—Mr. Srinivasa Rao. is entitled to the thanks of the legal profession and of the students of comparative jurisprudence for the 2nd edition of his book on Legal Maxims. The 1st edition has become considerably out of date as it was issued as far back as 1873. But the large mass of legislation that has proceeded from the Legislature of this country during the interval has enabled the author to draw largely upon it for illustrations of the maxims which he deals with. The book is of importance to Indian students who may be unable to see in the study of such standard books as Broom's Legal Maxims their application to the laws in force in India. The treatment of the maxims is necessarily cursory, having regard to the size of the volume. We would offer one criticism upon the work which, we hope, in a future edition the author may see fit to remedy. A work of this kind is eminently suited for comparison of those rules of interpretation which are celebrated in this country as the rules of the Mimamsa. A lawyer versed in Sanskrit can point out numer-

ous parallels between the rules of interpretation contained in Jaimini's Mimamsa and the maxims dealt with in this book. We commend this book to students of law and members of the profession in this country.

Pleadings in Indian Courts by Pundit Sheo Narain, Pleader, Chief Court, Punjab, published by *The Civil and Military Gazette Press, Lahore.* Price Rs. 4:—We owe an apology to the author of this book, Mr. Pundit Sheo Narain, for our delay in noticing this volume. We entirely approve of the design of this book, though the treatment of various topics is open to great improvement. This is partly an endeavour to supply a long existing want of forms of plaints, written statements, decrees, etc., with appropriate notes briefly pointing out the bearing of the various Indian enactments upon the language and substance of those forms. We cannot say the author has been very successful in carrying out his object, but we welcome it as a first attempt in that direction.

Fisher's Law of Mortgages, 5th edition, by Arthur Underhill, M.A., LL.D., published by *Butterworth and Co.,* 7 Fleet Street, London, E. C. Price 2 *l.* 12 *s.* 6 *d.*—The law of mortgages is one of the most complicated and troublesome chapters of law both in England and in India, and the treatise of Mr. Fisher has long been recognized as the standard treatise upon the subject. The book has attained such well-deserved reputation that it is needless for us to say anything in praise of it at this time of the day. We welcome the appearance of the new edition by Mr. Underhill, who has spared no pains to increase the usefulness of the book by bringing the law up to date and supplying better facilities for reference.

The Madras Law Journal.

PARTS X & XI.] OCT. AND NOV. 1897. [VOL. VII.

THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE IN MADRAS.

We have seen the reports of the administration of civil and criminal justice and the orders of Government thereon. The publication of these reports is always a matter of interest, and the review of judicial statistics by the Government and by the public is the necessary epilogue to the tale of judicial administration. The most prominent features of the year's administration lie in the increased popularity of Village Courts and Village Magistrates, the increasing proofs of the undoubted efficiency of District Munsifs and the signs of decadence that are visible in the higher branches of the judicial service. The number of Village Courts rose from 3,091 to 4,371 and the number of suits instituted in them rose from 70,136 to 85,584 during the year under review. The number of Village Magistrates similarly rose from 5,631 to 6,333, and the number of institutions in those courts from 10,839 to 11,802. As regards the constitution of the Village Courts it appears, the change contemplated by the Village Courts' Act, I of 1889, by the constitution of Bench Courts, appears to have been effected in parts of ten districts. There is no return published as to the number of such courts, the amount of business done by them, and the degree of popularity which they have succeeded in acquiring. We would suggest that some Honorable Member might put a question in the Legislative Council to elicit information on the subject. The District Munsifs come in for the usual *quantum* of praise by the High Court and by the Government. The Government observe, " As observed by the Honorable Judges, the amount of work done by District Munsifs on both sides of their courts was the largest on record. Notwithstanding the advance in institutions and in the number of cases which were contested, they disposed of more cases than were received during the year, and thus

greatly reduced the arrears. A larger number of contested suits was decided and fewer small causes were pending for more than three months." We hope that the steady good work which this class of judicial officers has been turning out year after year will induce the High Court and the Government to regard with favor the application made on their behalf to extend the long vacation from six weeks to two months as in the case of the higher judicial officers and their ministerial establishments. The work of the Revenue Courts does not appear to be altogether satisfactory, and, if in consequence of the Rent Recovery Bill, any portion of their work will be indirectly transferred to the Regular Courts, the change will only be welcome to the public. The number of suits disposed of by them was less than in the preceding year, and in consequence the arrears increased by about 70 per cent. Only 34 per cent. of the decisions of these courts appealed against were confirmed, the proportion being smaller than in previous years, while, on the other hand, the percentage of the decisions of District Munsifs confirmed was 64·02. We cannot help repeating the remarks that have been made by us in previous years, that, although our Subordinate Judges are as a class superior to our District Judges, there is yet very considerable room for improvement in the quality of the material which goes to make them. We cannot resist the conviction that appointments from the Bar direct to some of the places will induce greater emulation in that body, and thus increase the efficiency of the whole service. As matters stand at present, it is difficult to find men in their ranks who can be confidently recommended to fill the highest judicial offices available in the country.

Coming to the High Court, there are several matters of interest to engage our attention. The number of appeals from the decisions of a single judge on the Original Side rose from 54 in 1895 to 83, though it must be admitted at the same time that the number of appealable decrees passed rose from 173 to 272. The proportion, then, of appeals to appealable decrees is about 30 per cent., a larger percentage by the way than in the case of District Munsifs, the appeals from whose decrees bore a proportion of only 13·95 per cent. to the number of appealable decrees passed by them. A new method has been discovered in the High Court to reduce the number of appeals from the Original Side. Evidence is taken down by the judge himself in his own hand, and when such

evidence forms part of the judge's notes, copies have been refused to the parties aggrieved by the decision of the judge. In the absence of the oral evidence, it will be impossible in many a case for the appellant to satisfy the appellate court that the original judge was wrong in the conclusion arrived at from the evidence. If this course is persisted in; and no other method is devised for taking down the evidence in court, there must be a considerable falling off in the number of appeals preferred hereafter. The quantity of work done on the Appellate Side was less than in previous years, although on the Original Side it was largely in excess. The number of appeals and second appeals preferred in the High Court has fallen below the figures of the two previous years, and the number of revision petitions is also found considerably below the figures in 1895. The number preferred in 1896 was 529 as against 947 in 1895.

As regards the criminal work done by the High Court, we find the following paragraph in the report:—

"The percentage of appeals to appealable sentences of Sessions Judges was 73·3, or 7·9 per cent. less than in the previous year; the percentage of confirmation was 81·5, or 6·7 per cent. above the figures in 1895." Again, we find it stated in paragraph 58 when speaking of revision cases: "In 66·72 per cent. of the total number of cases decided as against 59·5 per cent. in 1895, the proceedings of the courts below were not interfered with. In 58 per cent. of the cases reported by Sessions Judges and 70 per cent. of those reported by District Magistrates as against 65 and 71 per cent. respectively in the previous year, the proceedings were quashed or otherwise modified. In 7·5 per cent. as against 17 per cent. in 1895 of the cases in which parties moved the High Court, the proceedings of the lower courts were interfered with." The question is, what interpretation are we to place on these figures? The greater percentage of confirmation in all classes of cases, civil and criminal, appeals and revisions, may indicate a sudden rise throughout the whole subordinate judicial service among Munsifs and Magistrates and Judges in their judicial capacity and in the care and conscientiousness with which they disposed of the cases that came before them. Or these figures may tell another tale of an increased inability on the part of the High Court to deal with its judicial work efficiently, which necessarily results in larger confirmations and more summary

dismissals. We do not think that the public can have very great difficulty in determining which is the more probable explanation. We do not find a list appended of the mode in which the various cases that came before the High Court are disposed of, showing at what stages they came to a termination. If a return were published of the number of civil and criminal revisions disposed of without admission in the years 1896 and 1897 as compared with previous years, the large disparity in the figures that will then become apparent will require explanation. A much larger percentage of these cases is dismissed at the first stage than in the previous years, though the institutions under each head appear to be smaller. This last fact will render it difficult to seek for explanation in the supposed disposition of the public or the profession to resort to the appellate tribunal lightly.

While dealing with the administration report, we cannot fail to draw attention to the important and growing evil, namely, the practice of striking off cases, because some paper called for by the Registrar has not been produced by the appellant within the time given. The time originally given is, of course, generally extended, but in several cases, it becomes impossible for the party to comply with the requisition of the Registrar within the extended time allowed. We have before now questioned the power of the High Court to strike off such cases, but there is no disposition on the part of the Judges, or to speak more correctly, of the First Bench before which such cases are always posted, to consider the legality of the procedure, or the impropriety of requiring the party to satisfy the demands of the Registrar in respect of matters which are not provided for by the Code of Civil Procedure. We must also lodge a protest against the dismissal of cases, because a heavy bill for printing deposit is not paid within the time specified. These and other ways help no doubt to swell the disposal of work and to keep up the credit of the Judges in any comparison which may be made with their predecessors. We do not find the High Court calling the attention of the subordinate tribunals to the necessity of a careful and conscientous discharge of duties by precept and by example. It is also becoming a matter of increased difficulty to the Reporter to find a sufficient number of sound and learned judgments worthy of reporting in the Madras Series. There is a strongly growing public feeling that the administration of justice is not altogether satisfactory.

THE CRIMINAL PROCEDURE CODE AMENDMENT BILL.

We have carefully read through the Criminal Procedure Bill that is now before the Imperial Council. It is certainly high time to re-enact the Code of Criminal Procedure with the numerous modifications introduced by subsequent enactments as a consolidated Code with such further changes as commend themselves to the public at large. We cannot, however, congratulate Mr. Chalmers upon the production of the Bill before us, for we do not believe, it will add very much to his reputation. We welcome the two important modifications of the existing law in Ss. 561 to 562 of the Code. The principle of not sentencing a first offender, but setting him at liberty on his recognizance to come up for sentence whenever he breaks it in the case of certain offences is recognized in the English Law and the sections dealing with it appear to have been taken from 50 and 51 Vic., Ch. 25. See Art. 22, p. 12 of Stephen's Digest of Criminal Law. The rule of police supervision in the case of certain habitual offenders as distinguished from security to keep the peace is also an excellent provision. See 34 and 35 Vic., Ch. 112, S. 8, and Art. 11, p. 7 of Stephen's Criminal Law. No words are necessary to commend these excellent provisions, and the only wonder is that they were not enacted before now in this country.

But the Bill appears to us to make a distinctly retrograde step in certain respects. We cannot approve of the addition made to clause 8 of S. 526, of the words "unless it is of opinion that the application is made for the purpose of delay or otherwise prejudicing the course of justice." There are very few Magistrates who welcome the suggestion of an application to the High Court for transfer; and, unless the Magistrate is bound to postpone or adjourn the trial, there is very little doubt that in the majority of instances he will be of opinion that the application is made for the purpose of delay or otherwise prejudicing the course of justice. At any rate the Legislature ought to place the Magistrate above the temptation of being led to consider that the application for transfer is made only for the purpose of delay or of obstructing justice, by requiring him in all cases to grant a reasonable postponement and putting him beyond the suspicion of being actuated by considerations of personal disinclination to the transfer, however

just the application may be in the particular circumstances. The policy of the law is to protect judges, against even the suspicion of being actuated by other than considerations that are purely judicial. If the amendment is to stand, we would suggest the qualification that the Magistrate or Judge must record his reason for thinking that the application is made for the purpose of delay or otherwise prejudicing the course of justice.

Again, the statement of objects and reasons does not bring out the full scope of the amendment to S. 439, which runs as follows:— Clause 5 runs:—"Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained, and except as provided by this Code, no proceedings by way of appeal or revision shall be entertained." In the statement of objects and reasons we find it stated with reference to this clause that if the person affected has the right of appeal, he should not be allowed to move a court of revision without having previously applied for relief to the appellate Court. The language of this amendment covers cases of applications by complainants in cases of acquittal for revision, though they have no right of appeal and the Government has; and also cases of references by Sessions Judges and District Magistrates for revision by the High Court when the party has failed to prefer the appeal. The amendment may in one sense be good, as it will do away with interference with an acquittal at the instance of the complainant, but it is doubtful from the statement of objects and reasons whether that is contemplated.

An important change is effected by clause 2 of S. 257 in the trial of magisterial cases, and by the last clause of sub-section 1 of S. 256. By the latter part of clause 1 of S. 256, it is enacted that the right to recall and cross-examine any witness for the prosecution present in the court or its precincts after the accused has entered upon his defence should be limited to cases where the witness has not been previously cross-examined as to the facts constituting the charge. S. 257, cl. 2, provides that when the accused has cross-examined or had the opportunity of cross-examining any witness, the attendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the purposes of justice. The result of this amendment is that, unless the witness for the prosecution has been cross-examined then and there after his examination-in-chief, it will be impossible for the

accused afterwards to cross-examine the witness. The common practice of reserving the cross-examination of a prosecution witness which the magistrate is bound to accede to, because the accused has the right of summoning a witness for cross-examination after entering on his defence, will be put a stop to. We cannot think that these changes are altogether necessary. The present practice of giving the accused the liberty of cross-examining the prosecution witnesses later or a second time, has not been shown to have been abused; nor there is any reason why it should be if the Magistrate is a competent man and able to keep the accused or his pleader within the limits assigned to him by the law.

We regret that the Legislature has accepted the interpretation placed by the majority of the Allahabad Judges on S. 161 in preference to that of the minority and the Calcutta High Court. We have elsewhere pointed out that the view of the minority was in consonance with the dictates of natural justice. See 7 M. L. J. p. 372. There does not seem to be any satisfactory reason why a statement made to a Police Officer should not be used to discredit a witness who was telling a different story at the trial.

It is provided by the addition of cl. 7 to S. 145 that proceedings under the section shall not abate by reason only of the death of any of the parties thereto. We do not understand how it is proposed to continue the proceedings. There is no procedure provided for bringing in the representative or for determining which of several contending claimants is the representative. Nor would it be fair to pass an order with only one of the parties before the court, without the other party having an opportunity of adducing evidence.

Cl. 8 of S. 88 provides for an adjudication of conflicting claims to property attached by a magistrate where there has been default of a witness to appear after proclamation in the manner provided by S. 278 of the Code of Civil Procedure. The enquiry under S. 278 is not confined to the mere question of possession. Cl. 8 of S. 88 proposes to limit it to the question of possession which does not seem to us to be altogether a proper course.

There are certain amendments to which we may also make reference, as setting at rest certain doubts and difficulties felt by

the different High Courts, or as making some useful additions for the better carrying out of the provisions of the Code. Cl. 3 of S. 102 makes provision for personal search.

The words "tangible immovable property" in S. 145 have been omitted and the words "land or water" substituted with an explanation that they include houses, fisheries, crops or other produce of land and the rents or profits of any such property. It may be hoped that this will do away with the difficulty that was felt in construing the words "tangible immovable property."

The definition of the word "court" in S. 195 relating to sanctions has been inserted excluding Registrars and Sub-Registrars under the Registration Act from the signification of the term. The conflict between the Madras and the Bombay High Courts as regards the legality of a criminal proceeding without the sanction of a Sub-Registrar has thus been removed. The decision of *Subrahmania Aiyar* and *Davies*, J. J., in a recent case that the abetment of offences referred to in S. 145 does not fall within the scope of that section is overruled by cl. 3 of S. 195.

Cl. 2 of S. 225 virtually enacts that an objection as to the improper joinder of charges should be taken at the earliest possible oppurtunity. We do not think that cl. 3 of S. 233, which seeks to give effect to the decision of the Allahabad High Court is happily worded. The object aimed at in rendering an accused punishable for misappropriation as shown by the net result of the account should alone be indicated in cl. 3, instead of the clause doing away with the necessity for particulars in every case of a charge for misappropriation or breach of trust.

We do not think that the illustration to S. 403 is a desirable addition. The prospect of reversal of the acquittal in respect of an offence is held in *terrorem* over the unfortunate prisoner who thinks of appealing against a conviction for another offence charged upon the same facts.

A clause has been added to S. 476 that there shall be no revision of an enquiry directed under S. 476. This is in accordance with the view of the Bombay High Court, though it has not been followed in Madras. In regard to proceedings in respect of main-

tenance, the accused person is rendered competent to give evidence on his own behalf.

Notwithstanding the numerous changes that are introduced in this Code, we regret to find that several important matters which require to be dealt with are left unnoticed. It appears to us that the law with reference to bail is in this country in a form extremely unsuited to the conditions of this country. The only proper test for refusing bail appears to us to be the chance of the prisoner absconding. In a country like England, applying that test, bail might have to be refused in many cases, by the facility for the prisoner crossing the British Channel and finding a comfortable home in any of the continental countries. With reference to the people of this country who are very much attached to their homes, and where absconding is practically impossible, there is no reasonable ground for refusing bail in most cases, unless, of course, the offence is a capital offence or one approaching it, where the temptation for the prisoner making away with himself is great. The probability of the prisoner being convicted upon the evidence which is often regarded as a test appears to us altogether indefensible. We are also told sometimes that the chance of the prisoner tampering with the prosecution evidence is to be taken into consideration. The chance of tampering is mainly through the instrumentality of the prisoner's friends and relations who are always at liberty to employ the means at their disposal for that purpose. The suggestion might, with equal force, be made against the prosecution tampering with the defence evidence. Any danger of this description may be met by a direction that the prisoner shall not go beyond a certain defined area during the time he is on bail. The rigorous enforcement of the law as it is at present which results in the refusal of bail in many a case in which the prisoner is ultimately found innocent and the consequent detention in jail for a period which in many cases works for the prisoner the forfeiture of his caste embitters the feelings of many an innocent man and undermines the loyalty of a large number of people to the Government which is regarded as responsible for such an iniquitous law. If the Government were only able to place itself in the position of the people and to realize the consequences to the unfortunate Hindu prisoner, though declared innocent at last, we have no doubt that the amend-

ment of the law of bail would be speedily undertaken. We think the matter ought to be fairly and fully represented to the authorities in order to induce them to examine the subject.

Again, S. 491 saves the provisions of the Regulations, under the authority of which the Natu Brothers have been deported. Government cannot adequately realize the consternation which the exercise of such a power has produced in this country. The exercise of arbitrary power is sweet to the possessor, but he little realizes the feelings of intense discontent which it necessarily engenders. The duty should be cast on the Government to explain its action to the High Court upon application made to the High Court for a writ of *habeas corpus*. It may be, some limitation may be engrafted so as to give the Government some discretion. But this power of arbitrary deportation can only produce one feeling, namely, of disgust in the minds of all thinking men who are not hopelessly biased. We would strongly appeal to the Government to modify the law on this subject.

The trial of Mr. Tilak in Bombay has prominently brought before the public the question of the composition of a jury trying a native offender. A European has the right of claiming a mixed jury in which the majority shall be his own countrymen. There is no reason why, in the Presidency town, a native should not be conceded the right, which he enjoys in the moffusil under S. 275.

GROUNDS OF CRIMINAL JURISDICTION.

This subject naturally divides itself into two parts—grounds of criminal jurisdiction (*a*) as between different States and (*b*) as between the several courts exercising local jurisdiction within the same State.

First, as to the former. The practice of the various States in exercising jurisdiction over offences is based upon one or more of the following theories:—

I. The theory of allegiance, that is, that a State has jurisdiction over all offences committed by its subjects in whatever part of the world. Most civilized States claim some kind of obedience to their Criminal laws from their subjects in foreign civilized lands. In

France, for instance, the French Criminal Code of 1808 gives cognizance to the French courts of 'crimes' committed abroad by French citizens. It has been held that 'crimes' do not include minor offences; and among those offences not cognizable in France, the Court of Cassation in 1855 included adultery. In 1866, a statute was adopted extending the jurisdiction to 'delicts,' provided such 'delicts' are penal in the place of their commission. Hence it is now held that adultery committed abroad by a Frenchman is punishable in France when it is punishable in the place of its commission. (Wharton, *Conflict of Laws*, p. 696, note 2.) The Code for the German Empire punishes acts of its subjects which are criminal in the country where they are committed as well as in Germany. The Italian and the Austrian Draft Codes of 1876 and 1867, respectively, are to the same effect; providing, however, that the punishment shall not, as a rule, exceed that which might have been awarded by the law of the place where the act was done. The Bavarian Code of 1861 establishes the liability of subjects without any reservation. (Holland, *Elements of Jurisprudence*, 4th edition, p. 351.) The practice in this matter of England and the United States is different. In the former, no crime by a subject in a foreign land is by the common law triable by the courts. But by statute various offences are made so triable. By 35 Hen. VIII, ch. 2, it is enacted that all offences already made or declared, or thereafter to be made or declared, to be treason, misprision of treason, or concealment of treason, committed by any person out of the realm of England, may be tried before the Court of King's Bench by a jury of the shire in which the Court sits or by commissioners appointed for the purpose by the king in any shire. By 24 and 25 Vict., ch. 100, s. 9, murder or manslaughter committed by any subject of Her Majesty anywhere may be tried within the jurisdiction. The Foreign Enlistment Act, 33 and 34 Vict., ch. 90, creates many offences, most of which can be committed either within or without Her Majesty's dominions. It is not quite certain how far the offences created by the acts prohibiting the slave trade are locally confined to the Queen's dominions, but it seems that they apply to all parts of the world. Lastly, there are several statutes by which Governors, Lieutenant-Governors, and other civil and military officers of colonies and other British possessions abroad, may be tried in England for acts of oppression

done in the discharge or under colour of their official powers. (2, Stephen's *History of Criminal Law*, p. 14.) The Common Law of the United States of America is the same as that of England, but by statute, offences directed from abroad against the sovereignty or high prerogatives of the State, are punishable within the jurisdiction; but, as they are rendered cognizable whether committed by aliens or by subjects, the practice is more properly referable to the next succeeding head of self-protection. The claim which India makes to the obedience of its subjects to its criminal laws even when abroad is, perhaps, greater than that of any other State, France not excepted. By S. 188 of the Criminal Procedure Code, every native Indian subject of Her Majesty is liable to be tried in British India at any place where he may be found for any offence committed by him beyond the limits of British India. In *R.* v. *Elmstone*, 7 B., H. C. R., 89, *Westropp*, C. J., seriously doubted whether the Indian Legislature could make laws to bind its subjects for acts done abroad. By the Indian Councils Act, 1861, s. 22, the Legislature is empowered to make laws for "all persons, whether British or Native, Foreigners or others, and for all courts of justice whatever, and for all places and things whatever within the said dominions," and it was pointed out that, on a proper grammatical construction, the words 'within the said dominions' qualified as well 'persons' as 'things.' But now by 32 and 33 Vict., ch. 98, s. 1, the Governor-General in Council has power to make laws for all Her Majesty's Native Indian subjects, without and beyond, as well as within, British India.

II. The theory of self-protection, that is, that a State has jurisdiction over all offences, wherever and by whomsoever committed, which affect the safety of the State as a whole or that of any of its members. This is well illustrated by the practice of the Continental States of Europe. In France, foreigners are punished who, when in another country, have been guilty of offences against the safety of the French State, of counterfeiting the State seal or coin, and of forgery of paper money: but they cannot be proceeded against *par contumace*. In Belgium the law is identical; in Spain and Switzerland it is the same in principle, but differs somewhat in the list of punishable offences. Greece takes cognizance, in addition, of offences committed abroad against Greek subjects. In

Germany, the tribunals take cognizance of all acts committed abroad by foreigners which would be high treason if done by German subjects, as well as of counterfeiting coin, of forging bank notes and other State obligations, and of uttering the same. In Austria and Italy, the tribunals take cognizance as a matter of right, of crimes directed from abroad against the safety or high prerogatives of the State. In Italy, the criminal law has been in course of revision, and the proposed criminal code renders such offences punishable, if the penalty that can be inflicted amounts to imprisonment for more than five years; it also renders offences committed abroad to the prejudice of Italians cognizable, provided that they are punishable with more than three years' imprisonment. In the Netherlands, the tribunals take cognizance of offences of the same nature as those punishable by the French Code. In Sweden and Norway, proceedings may be taken against any person accused of a crime against the State, or Norwegian subjects, or foreigners on board Norwegian vessels, if the king orders the prosecution. In Russia, foreigners are punishable for taking part in plots against the existing government, the emperor, or the imperial family, and for acts directed against 'the rights of person or property of Russian subjects.' (Hall's *International Law,* 4th edn., p. 218.) In England, offences by aliens abroad directed against the State or its high prerogatives are not cognizable in the courts, unless some overt act takes place within the jurisdiction. The practice in the United States is different, for there all offences against the State and its high prerogatives, and perjury before American Consuls and forgery of consular papers, when committed abroad, by aliens or by subjects, are, by statute, made cognizable in the Courts. (Wharton, *Conflict of Laws,* pp. 702 and 712.) In India the law is the same as in England. S. 121-A of the Indian Penal Code, indeed, professes to enact that, 'whoever, whether within or without British India, 'conspires to commit any of the offences punishable by S. 121" or to do any other acts enumerated in that section (121-A) shall be punishable in India. But according to the construction adopted by *Westropp,* C. J., in *R.* v. *Elmstone,* the Indian Legislature has no power to pass laws binding upon persons outside British India, unless they are Native Indian subjects, (32 and 33 Vict., c. 98, s. 1,) or European British subjects or servants of the Government of India in allied Native Indian States, (28 Vict., c. 17, s. 1, and the Indian Councils

Act, 1861, S. 22.) In so far as that section, therefore, purports to bind any person outside British India, other than those named, it is *ultra vires* and void.

III. The territorial theory, that is, that that State has jurisdiction within whose territory the offence is committed. But these latter words are ambiguous and may mean either the State on whose soil the offender is at the time of the commission of the offence, or the State in which the crime takes effect or is intended to take effect. Hence this theory gives rise to two subordinate theories—(*a*) the subjective territorial theory which gives the jurisdiction to the State on whose soil the offender is at the time of the commission of the offence and (*b*) the objective territorial theory which gives the jurisdiction to the State within which the crime takes effect or is intended to take effect. There is much in common between the theory of self-protection and the objective territorial theory. Offences directed from abroad against a State or its high prerogatives may, by a stretch of words, be regarded as taking, or intended to take, effect within that State. And conversely, a State punishing offences taking effect in it, though the offender is abroad, may be said to act in self-protection. But the distinctive nature of the objective territorial theory is brought to light, when it comes into conflict with the subjective theory—a conflict which gives rise to several questions of great nicety and much importance, which have not been finally settled even in the jurisprudence of particular countries. A in State X shoots B in State Y. A in State X mails a letter containing false representations to B in State Y and thereby induces him to part with property in that State. A in State X mails a letter or a newspaper containing defamatory statements to B in State Y. A in State X mails a packet containing poisoned food to B in State Y, with the intent that he should partake of it and die. A in State X pollutes a stream which flows through State Y. A in State X employs a conscious or unconscious agent to commit an offence in State Y. A in State X forwards by rail a packet containing an explosive substance, with the knowledge that it will be transhipped in State Y to the carriages of a Railway Company by whose rules it is a punishable offence to send such goods without notice, although no notice is required by the rules of the Company by which it is originally forwarded. A second class of offences is where several

persons conspire together in State X to commit an offence in State Y, or where A incites or instigates B in State X to commit, say, murder in State Y, or in State X is an accessory before the fact to a murder committed in State Y. A third class is where A in State X is an accessory after the fact to an offence committed in State Y, for instance, dishonestly receives or retains in State X goods knowing them to have been stolen in State Y. In all these cases, the question arises whether State X or State Y or both can take cognizance of the offence. If the subjective territorial theory prevails, State X will take cognizance in all these cases, while if the other theory is the right one, State Y will have jurisdiction. In America, it has been, or is likely to be, held that State Y has jurisdiction in all these cases, whether or not State X has also jurisdiction. (Wharton *Conflict of Laws*, p. 717, note 1; *ib*, *Criminal Law*, 8th ed., § 278—280.) In England the law on this point is in a state of hopeless obscurity, which is inexplicable, considering the immense debt which criminal jurisprudence owes to English lawyers.

According to the English Common Law, the place where the consequence of an act took place was regarded as having jurisdiction to try the offence. In *R.* v. *Coombes*, (1 Leach, C. C., 388) where a loaded pistol was fired from the land at a distance of 100 yards, from the sea, and a man was maliciously killed in the water 100 yards from the shore, the offence was held to be within the jurisdiction of the Admiralty and not the Common Law Courts, 'for the offence is committed where the death happens and not at the place from whence the cause of death proceeds.' But neither the reasoning of the Judges nor the argument of counsel is given in the Report. In the *United States* v. *Davis*, (2 Summer, 482), the master of an American vessel, lying in the harbour of one of the Society Islands, took his gun in hand which went off killing a person on board another ship. *Story*, J., following *Coombes*' case, held that no American Court had jurisdiction to try the offender, the offence having been committed on board a foreign vessel in the jurisdiction of a foreign government. In *Forsyth's Cases and Opinions on Constitutional Law*, p. 219, a case is reported where the Law Officers of the Crown advised that the firing of a gun from a fort in Barbadoes killing a person on boardship 2 miles off was not triable in any Court of Common Law but in the Admiralty Court. In all these cases, the whole of the consequence took place in one and the same

jurisdiction. But where the consequence took place partly in one jurisdiction and partly in another, as for instance, a person received a wound in jurisdiction X and died thereof in jurisdiction Y, there was a difficulty whether X or Y could try for the offence, as the whole of the consequence could not be said to have taken place in either. So much so that in *Lacey's case*, cited in *Bingham's case*, 7 *Coke's Reports*, it was held that in such a case neither X nor Y had jurisdiction. It is now by statute provided that felonies or misdemeanours begun in one county and completed in another are triable in either (7 Geo. IV, c. 64, s. 12): And also that where a person dies on land of a wound received at sea, or on land after being poisoned at sea, or *vice versa*, the offender may be tried in any county or place in which such death, stroke or poisoning or hurt shall happen in the same manner in all respects as if such offence had been committed in that county or place. (24 and 25 Vict., ch. 100, s. 10.) But it has been held that these statutes do not confer a jurisdiction on the English Courts where part of the consequences took place outside English jurisdiction altogether and only part within. Thus in *R.* v. *Lewis*, (26 L. J. M. C., 104) where a foreigner on board a foreign ship inflicted a blow on another foreigner on the high seas, it was held that the English Courts had no jurisdiction, although the death occurred and the offender was in custody within the jurisdiction. The test was laid down to be whether the Courts would have had jurisdiction, supposing that the whole of the consequences had taken place where only part had. In *R.* v. *Keyn* (L. R., 2 Ex. D., 63) a different and, as it would appear, the true note was for the first time sounded towards the close of the judgments of *Amphlett*, J. A., and *Cockburn*, C. J.. A German steamer named, *The Franconia*, had, by the negligence of the captain, the accused Keyn, run down a British steamer called the *Strathclyde*, within the territorial waters of England, killing a woman named Young. Keyn was thereupon indicted before the Central Criminal Court for manslaughter, and convicted, but the question of law whether the English courts had jurisdiction over the offence was reserved. Two questions were involved—(1) whether the English Criminal Law extended to the territorial waters so as to bind foreigners on board foreign ships; (2) supposing the English Criminal Law did not so apply, whether the offence was committed on board the German steamer where the accused

remained, or on board the British ship where the negligence took effect and so within English jurisdiction. It is clear that if either the first question be answered in the affirmative or with respect to the second it be held that the offence was on board the British ship, the jurisdiction of the Court could be upheld. The majority of the Court (*Cockburn*, C. J., *Kelly*, C. B., *Bramwell*, J. A., *Lush* and *Field*, J. J., *Sir R. Phillimore*, and *Pollock*, B.,) held that there was no jurisdiction and therefore in the opinion of that majority the offence was not committed on board the *Strathclyde*. The minority (*Lord Coleridge*, C. J., *Brett* and *Amphlett*, J. J. A., *Grove*, *Denman*, and *Lindley*, J.J.,) upheld the conviction unanimously answering the first question in the affirmative. But with respect to the second, there was dissension among these Judges. *Denman*, J., was strongly of opinion that the offence was committed on board the British ship. He relied upon the cases of *Coombes* and *United States* v. *Davis*, as also that reported in Forsyth, for the position that the place where an offence takes effect has jurisdiction. That being so, can any difference arise, he asks, because in those cases there was intention and in this case there was none? No. Such a distinction would not only be very inconvenient but also contrary to all established principles of law. Suppose a person on board a French ship on the high seas shoots another on board an English ship, can it be borne that the former should not be triable in England but allowed to escape with impunity? *Lord Coleridge*, C. J., was also of the same opinion but not without great hesitation. *Brett*, J. A., thought that the offence was committed neither on board the *Franconia* nor on the *Strathclyde*, while *Grove* and *Lindley*, J. J., expressed no opinion on the point. On the other hand, *Amphlett*, J. A., expressed himself in words which strike the keynote of the whole matter. "Now, according to the decision in *R.* v. *Coombes*, the crime must, for the purpose of determining the venue, be held to have been committed on the English ship where the death occurred; but this doctrine founded as it is upon a convenient fiction and binding no doubt upon a British subject, does not decide the question before us, which is whether a foreigner who committed an offence while he was *de facto* outside English territory, could be made amenable to English Law. With some doubt, I have come to the conclusion that he could not. I can findno authority for saying that a State has any jurisdiction to punish a foreigner who

at the time of the commission of the offence was *not within the territory and consequently not owing it any allegiance.*" It will be seen that while the opinions of the minority of the Judges on the second question were not necessary to the decision of the case, the opinions of the majority were. Among the latter, *Cockburn*, C. J., distinguished the present case from that of *Coombes* and the others, on the ground of absence of intention. And in making such a distinction, he was supported by *Bramwell*, J. A., and *Sir R. Phillimore*. But it may be doubted whether *Denman*, J., was not more right in condemning such a distinction as leading to absurdities and being contrary to established principles of law. *Cockburn*, C. J., however, proceeded further, and, assuming that the crime was committed on board the British ship, said, and this is the most valuable part of his judgment so far as the present controversy is concerned, "The question is, and this appears to me to have been lost sight of in the argument—not whether the death of the deceased, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant at the time the act was done was himself within British jurisdiction. . . . . *According to the doctrine of Lord Coke in Calvin's case*, 7 *Co. Rep.*, *protection and allegiance are correlative; it is only where protection is afforded by the law that the obligation of allegiance to the law arises; or, as I prefer to put it, it is only for acts done when the person doing them is within the area over which the authority of British Law extends, the subject of a foreign State owes obedience to that law or is amenable to its jurisdiction.*" Again, "the opposite view is founded on expediency, which is to prevail over principle." As to the argument put forward by *Denman*, J., that a person on board a French ship shooting another on board an English ship on the high seas, would escape with impunity, the learned Judge rightly points out that if the law of France is at all like that of England, the offender will meet with punishment in France. "I am aware," he goes on to say, "that this view is not in accordance with the decision in the American case of *Adams* v. *The People*, 1 Comst., (N. Y) 173" where it was held that a fraud committed by a citizen of the State of Ohio and residing in it, through an agent at New York, who was wholly innocent and ignorant of the fraud, could be tried in New York. But the learned Judge thought that the judgment in that case contained much loose reasoning and entirely overlooked

the turning point in it, namely, that the accused, being a foreigner and having been out of the jurisdiction when the act was done, owed no allegiance to the law of New York. *Pollock*, B., and *Field*, J., concurred in the judgment of *Cockburn*, C. J. The English case of *R.* v. *Sans Garrett* (6 Cox C. C. 260) does not seem to have been brought to his notice. The accused in that case had obtained from a banking firm in New York a circular letter of credit for £210, authorizing him to receive that sum or any portion of it from certain named correspondents in foreign countries, and then to draw upon the Union Bank in London for that amount in favour of the persons from whom he had received it. He went to St. Petersburg and having fraudulently altered the sum mentioned in the letter from £210 to £5,210, he presented it in its altered form to W. & Co., of that city, one of the firms named in the letter and obtained from them £1,200. He drew a bill for that amount on the Union Bank in favour of W. & Co., which was presented in London to the Union Bank, but the Union Bank, referring to their letter of advice, refused payment. On an indictment charging the accused with an attempt to obtain money by false pretences from the Union Bank in London, the Judges had no doubt that there was jurisdiction. Lord Campbell said 'a person may by the employment, as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our Courts.' Baron Parke said 'a person, though personally abroad, might commit a crime in England, and be afterwards punished here; as, for instance, if he, by a third party, sent poisoned food to one in England, meaning to kill him, he would be guilty of murder, if death ensued, although he could not be amenable to justice till he was personally within the jurisdiction.' But the accused was ultimately acquitted on the ground that no offence within the meaning of the Act under which the indictment was framed, was committed. In *R.* v. *Taylor* (4 F. & F., 511), the prisoner who had obtained money for a forged cheque abroad was held subject to punishment for the offence in England, because the cheque was afterwards presented there. In *R.* v. *Munton* (1 Esp., 61) money had been misappropriated abroad; but as false accounts intended to conceal the offence had been sent to England, *Lord Kenyon* held that the offence was cognizable by the English Courts. There is no doubt that if these cases had

been brought to the notice of *Cockburn,* C. J., in *R.* v. *Keyn,* he would have expressed his dissent from them as well.

It is difficult to estimate the effect of *R.* v. *Keyn* upon the law on this point. In *Queen* v. *Holmes* (12 Q. B. D., 23) H wrote and posted at Nottingham in England a letter addressed to G at a place out of England, containing a false statement by which he fraudulently induced G to transmit to Nottingham a draft for £150 which he there cashed. It was held, following *R.* v. *Cooke* (1 F. & F., 64) and *Rex* v. *Burdett* (4 B. & H., 95), that when a letter such as the one in question is posted, the pretence is made, and that since in the present case both the letter was posted, and the money received at Nottingham, there was *à fortiori* jurisdiction to try at that place. This case thus renders bad law so much of the cases of *R.* v. *Coombes, The United States* v. *Davis,* and that reported in Forsyth as laid down that the place where the offender is at the time of the commission of the offence has no jurisdiction to try for it. The rest of those cases also has, it is submitted, been rendered bad law by the decision of the four Judges (*Cockburn,* C. J., *Pollock,* B., *Field,* J., and *Amphlett,* J. A.,). in *R.* v. *Keyn.* Sir James Stephen is of a different opinion. "Upon the whole ", he says " four (?) of the Judges who decided the case of *R.* v. *Keyn* seem to have been of opinion that a crime committed by an act which extends over more jurisdictions than one in space is committed in the jurisdiction in which it takes effect, whether or not it is also committed in the jurisdiction in which it begins to be done. In accordance with this view, Baron Pollock and I lately held that a man who obtained goods from a merchant in Prussia by false pretences contained in a letter sent from Amsterdam, where he lived when he wrote the letter, obtained them in Prussia, and we refused a *habeas corpus* to prevent his extradition accordingly." (2 H. C. L., 11).

As to an extra-territorial abetment of an intra-territorial crime, the abettor would not be liable to the English jurisdiction, as, by the Common Law, an accessory could be tried only where the act of abetment occurred (2 H. Bl., 163, 2 East, 775, Bulwer's case, 7 Rep., Thomas and Fraser's edition, Vol. IV, 52, 53.) The converse question arose in the case of *Reg.* v. *Bernard* (1 F. & F., 240) which at the time attracted much attention. Bernard was accused

of having been an accessory before the fact in England to a murder committed by Orsini and others in France by throwing a shell with intent to kill the Emperor of France, but which actually killed some others. The question was reserved whether any offence had been committed of which the law of England would take notice. But as a verdict of not guilty was returned, it did not become necessary to decide the question. In *R.* v. *Kohn* (4.F. & F., 68) the accused, a foreigner, was charged with having conspired at Ramsgate to destroy a foreign ship, which was consequently destroyed on the high seas. *Willes*, J., in charging the jury asked them to find whether the prisoner was a party to a conspiracy to destroy the ship not limited to a destruction on the high seas; for, if it was contemplated that the ship might be destroyed off the bar at Ramsgate, then the English Court had jurisdiction. According to this case, therefore, an intra-territorial abetment of an extra-territorial crime is not punishable in England. Sir James Stephen is also of the same opinion, as, according to him, the English Law takes no notice of crimes committed abroad, but thinks that conspiracies might stand on a different footing. But Roscoe (Crim. Evidence, p. 240) commenting upon the case of *R.* v. *Kohn*, thinks that upon principle a conspiracy in England to commit a crime abroad ought to be criminal, for a conspiracy may be a crime, although the act proposed to be done is not in itself a crime, and thus a conspiracy between foreigners in England to injure a foreigner out of the jurisdiction might be a crime against the law of England, though the injury itself might not be under the jurisdiction of English Law and in that sense not criminal. In the case of murder, it has been, by statute 24 and 25 Vict., ch. 100, s. 4, enacted, that all intra-territorial abetments, incitements, conspiracies, etc., to commit that offence in respect of any person, whether he be within the Queen's dominions or not, shall be cognizable in the Courts.

The same principles would apply to accessories after the fact. A person in France dishonestly receiving goods stolen in England would not be triable in England, as, according to the English Common Law, accessories are to be tried in the respective places where their guilty acts take place. Conversely, a person could not be convicted in England of receiving goods stolen in Guernsey

(*R.* v. *Debruiel*, 11 Cox, 207). In *R.* v. *Carr*, 10 Q. B. D., 76; the prisoners were indicted before the Central Criminal Court in England for having feloniously received in England certain valuable securities which were stolen from a British ocean-going merchant ship, whilst she was lying afloat in the river at Rotterdam in Holland, moored to the quay. It did not appear who the thief was. It was held by Lord *Coleridge*, C. J.; *Pollock*, B.; *Lopes*, *Stephen* and *Watkin Williams*, JJ., that there was jurisdiction over the prisoners, inasmuch as the principal offence was within the Admiralty jurisdiction of England, thus clearly implying that where the principal offence was not triable in England, neither would the accessory be. The exclusion of jurisdiction over intra-territorial accessories, whether before or after the fact, to extra-territorial crimes, is not a little due to the fiction that the accessory follows the principal.

In India, it is satisfactory to note that one principle has pretty uniformly been followed, and that principle the one which must ultimately be regarded as the sound one. S. 2 of the Penal Code enacts that every person shall be punished according to the Code for every act or omission of which he shall be guilty within the British Indian territories. Take the case, for instance, of a person in British India shooting and killing another across the border. Murder is defined as doing an act with the intention of causing death. In this case the act which causes the death is pulling the trigger, and this is an act of which the person is guilty within British India. And it will be admitted that death is death, whether it takes place on this or that side of the border. So the person would be liable to British Indian jurisdiction. On the other hand, a person on the other side of our border shooting and killing another on this side would not be guilty of the act of causing the death, namely, pulling the trigger, within British India, and therefore would not be liable to British Indian jurisdiction. Similar remarks apply to the cases of defamation, cheating, criminal intimidation, etc., which are capable of being committed in more jurisdictions than one.

An extra-territorial abetment of an intra-territorial crime is not punishable in the Indian Courts. This was decided in *Reg.* v. *Pirtai*, 10 B., H. C., 356, where the conviction at Satara of a

person, a subject of the Kolhapur State, who in that State instigated a murder which was committed in Satara, was annulled by the High Court. But an intra-territorial abetment of an extra-territorial crime is, it would appear, cognizable, on general principles, in the Indian Courts. "It may be that the Indian Legislature had power so to legislate as to an abetment in India of an offence committed out of India, and may not have had power to legislate for the principal offence itself if committed beyond British Indian territory." Per *Westropp*, C. J., in *R.* v. *Elmstone*. Thus, S. 121 of the Penal Code penalises the abetment of waging war against the Queen, and illustration (*b*) shows that the principal offence may be in Ceylon, beyond British Indian territory. Similarly S. 125 penalises the abetment of the waging of war against an allied Asiatic State, although the principal offence itself will in the majority of cases take place outside British India; S. 236, again, penalises the abetment in British India of the counterfeiting of coin outside British India. Apart from these isolated instances, S. 109 of the Code provides for the abetment of offences in general. 'Offence' is defined in S. 40 of the Code as anything made punishable by that Code. The interpretation put upon this definition by *Westropp*, C. J., in *R.* v. *Elmstone*, is that it refers only to those acts or omissions which are made punishable, not merely by virtue of their quality, considered abstractedly from time, place and person, but by virtue as well of their place and time and the capacity of the person guilty of them, as of their quality. This narrow construction was also adopted in *R.* v. *Moorgy Chetty*, I. L. R., 5 B., 338, notwithstanding the vigorous protest of *West*, *J.*, and has received the indirect sanction of the Legislature. As the Penal Code, therefore, stands at present, there cannot, except in the special cases referred to, be an intra-territorial abetment of an extra-territorial crime, for the latter is not an 'offence.' (*Queen-Empress* v. *Ganpatrao Ramchendra*, I. L. R., 19 B., 105.)

Persons outside British India dishonestly receiving goods stolen in British India have committed no offence cognizable by British Indian Courts (*R.* v. *Kirpal Singh*, I. L. R., 9 A., 523.) Conversely, persons receiving or retaining in British India goods stolen abroad, would, on general principles, be guilty of an offence in British India. The contrary decision in *R.* v. *Moorgy Chetty*, proceeded in the main upon the construction of S. 410 of the Code. 'Stolen property'

was defined in that section as 'property the possession whereof has been transferred by theft, extortion or robbery, or which has been criminally misappropriated, or with respect to which criminal breach of trust has been committed.' It was argued by *Garth* and *Melville*, J.J., that the words 'theft,' etc., meant the offences of theft, etc.; that 'offence' meant anything punishable by the Code, both by virtue of its quality and by virtue of its time and place and the capacity of the person doing it; that theft, etc., committed outside British India were not 'offences' and the property obtained thereby not 'stolen property;' and that therefore there could be no dishonest receipt or retention of the same within the meaning of the Code. *Garth*, J., thought that the same result would also follow from general considerations. *West*, J., on the other hand in an able and learned judgment, arrived at a contrary conclusion, both upon general considerations and upon a construction of the Code. He was of opinion that the narrow construction put upon the word 'offence' in the Code was untenable, and that it referred to all acts of a nature made punishable by the Code, considered abstractedly from time, place and person. To remedy the inconvenience arising from the construction of S. 410 of the Code which prevailed on this occasion, the Legislature by Act VIII of 1882, S. 9, enacted that property may be stolen property, whether the theft, etc., was committed within or without British India. Of a more general character is the legislation of Act III of 1894, whereby sections 176, 177, 201, 202 and 212 of the Penal Code have been amended so as to include certain cases in which the principal offence was committed outside British India. The new section 216-A, introduced by that Act, imposing a penalty for harbouring robbers or dacoits, has an explanation to the effect that it is immaterial whether the robbery or dacoity is intended to be or has been committed within or without British India.

It is to be borne in mind that the provisions of the Code of Criminal Procedure, sections 179 to 184, giving jurisdiction to more courts than one in respect of the same offence, do not operate to confer a jurisdiction on our courts which no such court would have had without them but only to regulate the exercise of jurisdiction among them when there would have been jurisdiction independently of them. (*R.* v. *Pirtai*, 10 B., H. C., 356; *R.* v. *Adivigadu*, I. L. R.,

1 M., 171; *R.* v. *Bapu Daldi, ib.*, 5 M., 23; and *Nga Hoong* v. *The Queen*, 7 M., I. A., 72.)

IV. Lastly, the theory of 'general supervision' or of 'cosmopolitan justice,' as Professor Holland terms it, that is, that all States are equally interested in putting down crime wherever committed, and therefore that each State has jurisdiction over offences, wherever committed, if the offender be arrested within the territorial limits. In Austria and Italy we have seen that the tribunals take cognizance as a matter of right of offences directed from abroad, against the sovereignty or high prerogatives of the State. In Austria, other crimes are also taken cognizance of, provided an offer of surrender of the accused person has been made to the State within which the crime was committed, and has been refused by it. Italian law is also the same, with the exception that proceedings can be taken, without previous offer of surrender, when the crime has been committed within three miles of the frontier, or when stolen property has been brought into the kingdom. By the draft Italian Criminal Code, provision is made for proceeding against foreigners for certain offences committed by them abroad, directed against foreigners, provided that extradition shall have been offered to, and refused by, the Government of the State within which the act is done. In the Netherlands, foreigners can be proceeded against for murder, arson, burglary, and forgery of bills of exchange committed them abroad. (Hall, *International Law*, 4th Edn., 218.) In England and the United States this doctrine finds no illustrations whatever, and in India the law is the same, unless, indeed, the provisions of S. 1 of the Slave Trade Act, 39 and 40 Vict., c. 46, rendering the subjects of Asiatic States in alliance with Her Majesty, liable in common with subjects of Her Majesty, to be tried in British India, for any offence under the sections relating to slavery in the Penal Code, of which they may be guilty in any part of Asia or Africa, of S. 188 of the Criminal Procedure Code, rendering European British subjects liable to be tried in British India for offences committed by them in Native Indian States in alliance with Her Majesty, and of S. 4 of the Penal Code providing that servants of the Government of India shall be liable to be tried according to the Code for acts or omissions of which they shall be guilty within such States, be regarded

as furnishing exceptions. With respect to the last of these exceptions, it is to be observed that in so far as the section relates to servants of the Government of India who are European British or Native Indian subjects, it is merged in S. 188 of the Criminal Procedure Code, and in so far as it relates to servants who are not such subjects, it is practically useless, inasmuch as it has been held in *Empress* v. *Natwarai*, I. L. R., 16 B., 178, that, there being no provision similar to S. 188 of the Criminal Procedure, giving to any court local jurisdiction over offences by them, there is no court empowered to try such offences, although theoretically they may be triable in British India.

I shall next proceed to discuss the above theories and to examine how they fit in with the practice of nations in regard to the exercise of jurisdiction on the high seas and in barbarous and semi-barbarous lands.

M. A. TIRUNARAYANACHARI.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER IX.

On Partition of Stridhana.

On this subject Manu says: "But when the mother is dead, all the uterine brothers and uterine sisters shall equally divide their mother's wealth."(1) *Commentary*—'Equally' means 'without allowing any additional share to the eldest, etc.' Sisters unmarried and unprovided for are here contemplated agreeably to the text of Brihaspati which follows. '*Sanabhayah*' means 'born of the same womb.'

Accordingly, Manu says: "To the daughters of these sisters also, something in due proportion should with affection be given out of their grandmother's wealth.'(2) *Commentary*—'*Their's* stands for 'sister's.' '*Yathamsutah*' means 'according as the wealth is large or small.'

Again Manu says: "Her *anvadheya* property, as well as any wealth given her by her husband from affection, shall go to her

(1) Manu, Chap. IX, 192. (2) Manu, Chap. IX, 193.

issue if she die in the lifetime of her husband."(1) *Commentary*—'*Anvadheya*' will be subsequently defined. Halāyudha says that this text is intended to negative the right of the husband in these two kinds of property. So even where the wife dies during the lifetime of her husband.

Brihaspati says: "*Stridhana* goes to the issue, and the daughter if unmarried, shares in it. But if she is married, she receives some honorary trifle only."(2) *Commentary*—'Issue' means 'sons.' 'Shares in it' means 'shares equally with the sons.' '*Apratta*' means 'unmarried.' In the light of this text it must be understood that the text of Manu lays down that *only* unmarried daughters share equally with the brothers. As to the married, something, from a sense of fairness, should be given.

Gautama says: "A woman's property goes to her daughters, unmarried and unprovided for."(3) *Commentary*—This is not intended to negative the right of sons to share but to establish the right of daughters to share. 'Daughters unprovided for' means 'married daughters, childless, having an indigent husband or unfortunate otherwise.'

Manu says: "The *yautaka* property of the mother goes to the daughter alone."(4) *Commentary*—"*Yautaka*' here means 'wealth given to a woman at the time of her marriage by her father and the rest.' Halayudha, however, says, that '*yautaka*' means 'money given to a woman for sundries and improved by her by her own skill,' and that brothers and married daughters shall not divide it, but that the childless, the unfortunate and the unmarried daughters should share it equally.'

Vasishtha says: "Let daughters share the nuptial presents of their mother."(5) *Commentary*—Nuptial presents, *i.e.*, apparel, mirror, bracelets, etc.

Yājnavalkya says: "Daughters shall take the wealth of their mothers deducting debts due; and in default of them, their issue."(6) *Commentary*—'Debts', *i.e.*, 'debts due by the mother.' The meaning in effect, therefore, is that the daughters unmarried

(1) Manu, Chap. IX, 195.
(2) Brihaspati, Chap. XXV, 87.
(3) Gautama, Chap. XXVIII, 24.
(4) Cole. Dig., Vol. II, 605, CCCCXCI.
(5) Vasishtha, Chap. XVII, 46.
(6) Yajnavalkya, Chap. II, 117.

and unprovided for shall divide the *yautaka* and the nuptial present of their mother left after discharging debts due by her. In default of daughters, their issue, daughter's son, etc. This text applies where the marriage has been in the Bramha and other approved forms.

Vishnu says: "Where a woman dies leaving children, her wealth in all cases goes to her daughter."(1)

Manu says: "The wealth of a woman given to her by her father on any account, her Brahminee daughter shall take; or it may go to that daughter's issue."(2) *Commentary*—Where she has neither husband nor issue of her own, and where there are co-wives of different castes and daughters by them, then the Brahminee daughter takes the wealth of her mother's co-wife given by the latter's father. This is the meaning. Prakāsakāra says, that according to Medhatithi the expression, 'given by her father' is illustrative of all cases of *stridhana.*

Kātyāyana says: "In default of daughters, her wealth goes to her sons. But what she received from her kinsmen goes to her husband in default of her kinsmen. Married sisters shall share with kinsmen. Thus, legal partition of *stridhana* property is ordained."(3) *Commentary*—Wealth received at the time of marriage, *yautaka,* and wealth given by her father go to the sons in default of daughters. To other kinds of *stridhana,* persons previously named are heirs. In default of those previously named, it certainly goes to her husband.

Here ends the chapter on 'Partition of *Stridhana.*'

CHAPTER X.

On Partition of Stridhana of a woman, married according to the various forms of marriage dying without issue.

On this subject, Narada says: "The *stridhana* of a woman goes to her issue. If she dies childless, it is declared to go to her husband where she has been married in the Brahma or in one of the four forms mentioned after it. If married in one of the other

(1) Vishnu, Chap. XVII, 21. (2) Manu, Chap. IX, 198.
(3) Cole. Dig., 607, CCCCXCIII.

forms, it goes to her parents."(1) *Commentary*—The word 'four' in the text is not intended to exclude the fifth. Therefore, if married in the *Brāhma, Daiva, Ārsha, Gāndharva,* or *Prajāpatya* forms, the wealth of a childless woman goes to her husband; if in any other, *i.e.*, the *Rākshasa,* the *Āsura* or *Paisacha* form, it goes to her parents. This rule applies to *stridhana* received at the time of marriage.

Accordingly, Manu also says: "It is ruled that the property of a woman married in the *Brāhma,* the *Daiva,* the *Ārsha,* the *Gāndharva,* or the *Prājapatya* form goes to her husband alone if she die without issue. But the wealth given to her at her marriage in the *Āsura* or other forms, goes to her parents if she die without issue."(2) *Commentary*— '*Aprajasi*' means 'childless.'

Devala says: "On the death of a woman, her *stridhana* goes to her sons and unmarried daughters. If she dies childless, her husband, mother, brother or even father takes it."(3) *Commentary*—Her husband takes it, if married in the *Brāhma* and other forms; her mother in the *Āsura* and other forms. It must, therefore, be understood that the texts of Manu and Narada are interpreted consistently with what Devala has said.

Gautama says: "The *sulka* of the sister goes to her uterine brothers after the mother is dead. But some hold that it goes to them even before her death."(4) *Commentary*—The wealth received by the sister in the *Āsura* and other forms of marriage goes to her uterine brothers when the mother is dead. The particle '*cha*' means 'even.' Therefore it means—that the same rule applies to the sister's *sulka* even though the mother lives. Some read 'uterine sisters' for sisters.' Halāyudha observes that this is the view of some others.

Yājnavalkya says: "If a woman die without issue, her kinsmen take the wealth given her by her kinsmen, her *sulka* and what she had received after marriage."(5) *Commentary*—Here *sulka*

(1) Narada, Chap. XIII, 9.
(2) Manu, Chap. IX, 196 and 197.
(3) Cole. Dig., Vol. II, 603, CCCCLXXXIX.
(4) Gautama, Chap. XXVIII, 25 and 26.
(5) Yajnavalkya, Chap. II, 144.

means 'the price for which a girl is given.' '*Anvadheya*' is indicative of *stridhana*. Kinsmen by her mother. This text also applies to cases of marriage in the *Āsura* and other forms.

Manu says: "If an appointed daughter die sonless by accident, her husband shall take her wealth without hesitation."(1) *Commentary*—This rule must be understood to apply where the sonless appointed daughter leaves neither daughter nor sister.

Paithinisi also says: "When an appointed daughter dies sonless, her husband shall not take her wealth. It shall be taken by her daughter or by her sister." *Commentary*—Here it must be noted that the sister takes it in default of the daughter.

Yājnavalkya says: "He who having given a maiden withholds her (from her husband) is punishable and shall pay the husband's expenses with interest. But if she die, he shall pay everything, making allowances for expenses on both the sides."(2) *Commentary*—He who having promised by word of mouth to give a maiden withholds her without fault (on the part of the bridegroom) should be punished by the king and made to pay the bridegroom his expenses with interest. But withholding for proper reasons is no blame; for the same author says: "He may withhold from the bridegroom a maiden betrothed, if a better bridegroom is subsequently available."(3) *Commentary*—But if the maiden dies by accident, then he shall calculate what had been given by the father to honour the bridegroom's party previously and what had been given by the bridegroom's party such as finger-rings, etc., and pay the balance.

Sankha says: "The bridegroom shall receive back the *sulka*."(4)

Baudhayana says: "The wealth of a deceased maiden, the uterine brothers shall take. In default of them, it goes to the mother, and in default of her, to the father."(5) *Commentary*—'Maiden' means 'an unmarried daughter.'

Brihaspati says: "The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law

(1) Manu, Chap. IX, 135. (2) Yājnavalkya, Chap. II, 146.
(3) Yājnavalkya, Chap. I, 65. (4) Cole. Dig., Vol. II, 619, DX.
(5) Cole. Dig., Vol. II, 618, DVII.

and the elder brother's wife are declared equal to the mother. When these have no sons, *aurasa* or otherwise, or daughter's sons or the sons of the latter, their sister's son and the rest shall take their wealth."(1) *Commentary*—The meaning is that in default of the *aurasa* son, etc., of the mother's sister, etc., the sister's son, etc., takes the wealth of the deceased.

Here ends the chapter on 'Partition of *Stridhana* under the various forms of marriage.'

CHAPTER XI.

On the Nature of Stridhana.

On this subject, Manu and Kātyāyanā say: "*Stridhana* is declared to be of six kinds; wealth given before the fire, wealth given at the time of going to the husband's house, wealth given out of affection and wealth received from the mother, brother and father."(2) *Commentary*—'Given before the fire' means 'given at the time of marriage by any body whatever.' '*Adhyāvahanika*' means 'what is taken by the bride when she leaves for the husband's home.' Medhatithi says that *Adhyāvahanika* is wealth given by the father-in-law and the rest when the woman is taken from her husband's house to her father's. That meaning is also acceptable; for, the same reason applies. 'Given out of affection' means 'given by the father-in-law, etc., being pleased by her good disposition, virtuous conduct and skill.' The number 'six' is intended to show that there are no fewer, not that there are not more; for Yājnavalkya recognizes one more kind of *stridhana* called '*Adhivedhanika.*'

Yājnavalkya also says: "What is given by the father, the mother, the husband and the brother, what is received before the nuptial fire and *Adhivedhanika* are declared to be the peculiar property of women."(3)

The same author defines *Adhivedkanika* thus: "An equal share should be given as *Adhivedhanika* to the superseded wife where no *stridhana* had been given to her. If given, a half of that

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(1) Cole. Dig., Vol. II, 621; DVIII. (2) Manu, Chap. IX, 194.

(3) Yājnavalkya, Chap. II, 143.

is declared."(1) *Commentary*—She is said to be superseded when her husband marries another. Again Vishnu recognizes another kind of *stridhana* called *Anvadheya.*

He says: "What is given by the father, the mother, friends and brothers, what is received before the nuptial fire, what is paid for supersession *Anvadheyakam* and *sulka* are the different kinds of *stridhana.*"(2)

Narada says: "What is given before the nuptial fire, what is given when the wife leaves for the husband's house, what is given by the husband; likewise what is given by the brother and the parents are declared to be the six kinds of *stridhana.*"(3) *Commentary*—Here also it is not meant that there are no more than six kinds.

Devala says: "What is given for food and raiment, jewellery, *sulka* and wealth otherwise received are *stridhanam.*"(4)

Kātyāyana says. "Over wealth acquired by a woman by arts or given her out of friendship by others, her husband has ownership always. The rest is her own absolute property."(5) *Commentary*—The meaning is that the husband alone is the owner of wealth acquired by his wife otherwise than in the manner previously mentioned.

The same author says: "What is given to women at the time of marriage before the sacred fire; this is declared by good men to be their *stridhana* called '*Adhyāgnikrita,*' (given before the nuptial fire). What a woman receives while being taken from her father's house is declared her property called '*Adhyāvahaikam*' (given at her procession)."(6) *Commentary*—This is the *Adhyavahanika* as defined by Kātyāyana.

The same author says: "What is given to a woman by her mother-in-law or her father-in-law from affection and what is given her in return for her humbly prostrating herself (before elders) is

(1) Yājnavalkya, Chap. II, 148.
(2) Vishnu, Chap. XVII, 18.
(3) Narada, Chap. XVII, 8.
(4) Cole. Dig., Vol. II, 597, CCCCLXXVIII.
(5) Cole. Dig., Vol. II, 589, CCCCLXX.
(6) Cole. Dig., Vol. II, 585, CCCCLXIV and V.

called '*Lāvanyārjitham*' (wealth gained by loveliness). What is received by a woman after her marriage from her husband's family or from the family of her parents is called *Anvadheya* (gift subsequent). But Bhrigu gives the name of *Anvadheya* to wealth received by a woman after her nuptials from her husband or from her parents from affection. What is received by a woman as a reward for her managing and looking after the household utensils, beasts of burden, milch cattle, ornaments, and servants is called *sulka* (perquisite)."(1) *Commentary*—The meaning is 'what is given to a woman as gratification for her doing her duty well in respect of the household and the rest is called '*sulka.*' '*Saudhayika*' has been already explained in some previous context and is therefore not mentioned in this chapter.

Here ends the chapter on the 'Nature of *Stridhanam.*'

CHAPTER XII.

On Partition of Effects concealed.

On this subject, Manu says : " When, after all debts and wealth have been divided according to law, any other property is discovered, it shall be similarly divided."(2)

Yājnavalkya says : " When property is found to have been secreted by one or more co-heirs, they shall divide it again in equal shares. This is settled law."(3) *Commentary*—Seeing that, under the circumstances, a subsequent division naturally follows, Halāyudha says, that the injunction by means of this text indicates that the secreting of common property by one does not constitute the offence of theft.

Kātyāyana says :—" Let sons recover property secreted by one of them and divide it equally after the father's death. Property which the co-heirs have secreted from each other, or which has not been properly divided, let them on discovery thereof divide it equally. So says Bhrigu. Property acquired by one of the co-heirs after the partition belongs to him alone. But he must

(1) Cole. Dig., Vol. II, 586, CCCCLXVI and 587, CCCCLXVIII, 1—3.

(2) Manu, Chap. IX, 218.

(3) Yājnavalkya, II, Chap. II, 126.

divide with the rest property recovered by him after it had been stolen or lost and property above described. Property which a relative had secreted, he should not be compelled by violence to restore; nor shall one of many undivided co-heirs be compelled to make good what he had expended."(1) *Commentary*—'Stolen,' *i.e.*, by others. 'Lost' means 'missing.' 'Property above described' means 'paternal grandfather's wealth.' 'Should not be compelled by violence to restore' means 'should be recovered from him by use of wiles.' 'Should not be compelled to make good what he had expended' means 'should not, at the time of partition, be made to pay money expended, on the ground that he had benefited by it more than the rest.'

Brihaspati says: "If a debt or bailment common to all be fraudulently concealed by one, he shall be made to restore it, not by use of violence, but by the use of dodges calculated to deprive the defrauder of his property. Men given to pretending, covetous, wily and avaricious should be subdued by conciliatory methods, either by the loss of their own wealth or by wiles."(2) *Commentary*—When a common debt or bailment is concealed by one, some dodge should be used or act done to deprive the deceiver of his property, and he should be made to restore the property he had concealed; but not by use of violence.

Here ends the chapter on 'Partition of Effects concealed.'

CHAPTER XIII.

On Partition among Heirs unequal in Caste.

On this subject, Manu says: "The law already declared should be understood as referring to sons of wives of the same class. Learn now the law as regards sons by wives of different castes. Where there are four wives of a Brahmin in the order of castes and where sons are born of them, the following rule of partition is ordained. The chief servant, the impregnating bull, vehicle, ornaments and the house shall be given as the additional share to the son of the wife of the Brahmin caste, as also a larger share for pre-

(1) Cole. Dig., Vol. 485, CCCLXXVII, 1—4.
(2) Brihaspati, Chap. XXV, 96 and 97.

eminence. Of the rest of the heritage, he shall take three shares; the son of the Kshatriya wife, two; the son of the Vaisya wife, a share and a half; and the son of the Sudra wife, one share."(1) *Commentary*—'*Ekayōnishu*' means 'of the same caste.' '*Ekajathanam* means 'begotten by the same man,' *i.e.*, begotten by the same man on wives of different castes. '*Kenasah*' means 'one who carries the ploughshare.' 'Vehicle,' *i.e.*, horse, etc. Therefore the chief servant, etc., should be given to the son of the Brahminee wife. Of his three shares, one must be made large and valuable. The bull, etc., should be given him, if there be.

In regard to partition when no deduction is allowed, the same author says: "Or let all the heritable wealth be divided into ten shares and let the man who knows the law effect a legal partition according to the following rule:—The son of the Brahminee wife shall take four shares; the son of the Kshatriya wife, three shares; the son of the Vaisya wife, two shares; and the son of the Sudra wife, one share."(2) *Commentary*—The singular number in '*viprah*' being not in requisition, the same rule applies even where there are many such sons.

Nārada says: "In the case of sons by wives inferior in caste, their shares decrease in the order of castes."(3) *Commentary*—'*Varnavarah*' means 'Kshatriya and other wives of a Brahmin.' '*Oodhah*' means 'married.' 'Decrease of shares,' *i.e.*, three shares to the son born of the Kshatriya wife, etc. Some read '*Varnanthareshu*' for '*Varnavareshu.*' The meaning is the same even according to that reading.

In the Mahabharata, Bhishma says: "To a Kshatriya, O son of Kuru, two wives are permitted; or a Sudra woman may be taken as a third wife; but she is not permitted by the Vedas. The wealth of a Kshatriya, O Yudhishthira, should be divided into eight shares; and the son by the Kshatriya wife shall receive four shares of the paternal wealth; he shall also take all the implements of war which belonged to his father. But the son of the Vaisya wife shall have three shares, and the son of the Sudra wife, one share, *i.e.*, the eighth. The Sudra son shall take the share if given him by his

(1) Manu, Chap. IX, 148—151. (2) Manu, Chap. IX, 152 and 153.
(3) Narada, Chap. XIII, 13.

father; but shall not take it if not so given. To the Vaisyâ, one wife only is permitted; or he may take a second wife of the Sudra caste; but she is not permitted by the Holy Writ. The wealth of a Vaisya, however, shall be divided, O lord of Bharata, into five shares. I will now lay down, O lord of men, the mode of division among such sons. Four shares of the paternal wealth shall be taken by the son of a Vaisya wife. But the fifth share shall belong, O Bharata, to the son by the Sudra wife. He shall take that share if given by the father; but shall not take it if not so given."(1) *Commentary*—The word '*Drishtāntah*' means 'the Vedas.' The drift is that, although not spoken of in the Vedas, if a Kshatriya marries a Sudra woman as his third wife from desire, then her son takes a share. Similarly with regard to the subsequent portion of the passage, 'Implements of war,' *i.e.*, swords, etc.

Yājnavalkya says: "The sons of a Brahmin shall take four, three, two and one shares respectively in the order of the castes of their mothers. The sons of a Kshatriya, three, two and one shares respectively. The sons of a Vaisya, two and one shares respectively."(2) *Commentary*—This rule applies where a Brahmin marries four, and a Kshatriya, three, wives. 'The sons of a Brahmin' means 'the sons begotten by a Brahmin upon wives of different castes.' Where the Kshatriya and the Vaisya excel in good qualities, the rule of division pointed out in the Mahabharata applies; but where they are alike in quality, the rule of Yājnavalkya applies. Thus there is no inconsistency.

Vishnu says: "The sons of a Brahmin in the four castes shall divide the paternal wealth into ten shares. Of them, the son of the Brahmin wife shall take four, the son of the Kshatriya wife, three; the son of the Vaisya wife, two; and the son of the Sudra wife, one. If a Brahmin has three sons, but no Sudra son, then they shall divide the wealth into nine parts and take four, three and two shares in the order of their castes. If there be no Vaisya son, they shall divide it into eight shares; and shall take four, three and one share respectively. If there be no Kshatriya son, they shall divide into seven shares and take four, two and one share respectively. If there be no Brahmin son, they shall divide it into six shares and take three, two and one share respectively. This same rule of

(1) Cole. Dig., Vol. II, 308, CXLIII, 1—7. (2) Yājnavalkya, Chap. II, 125.

partition applies in the case of Kshatriyas, Vaisyas and Sudras. Again, if a Brahmin has a Brahmin son and a Kshatriya son, they shall divide it into seven shares; and the Brahmin son shall take four, and the Kshatriya three, shares. If a Brahmin has a Brahmin son and a Vaisya son, they shall divide it into six shares, the Brahmin shall take four, and the Vaisya two, shares. Where the Brahmin has a Brahmin son and a Sudra son, they shall divide it into five shares, of which the Brahmin son shall take four shares, and the Sudra, one. Again, where a Brahmin or a Kshatriya has a Kshatriya son and a Vaisya son, then the property shall be divided into five shares; and the Kshatriya son shall take three shares, and the Vaisya, two. Again, where a Brahmin or a Kshatriya has a Kshatriya son and a Sudra son, the property shall be divided into four shares, of which the Kshatriya son shall take three, and the Sudra, one. Again, where a Brahmin or a Kshatriya or a Vaisya has a Vaisya son and a Sudra son, the property shall be divided into three shares, and the Vaisya shall take two, and the Sudra, one share."(1)

Sankha and Likhita say: "Sons by wives of different castes receive shares in sub-duple proportions in the order of their castes."(2)

Vishnu says: "If a Brahmin has two Brahmin sons and one Sudra son, then the two Brahmin sons shall take eight shares and the Sudra one. Again, if a Brahmin has a Brahmin son and two Sudra sons, then the wealth should be divided into six shares, and the Brahmin son shall take four and the two Sudra sons, two. In this manner should partition be effected even in other cases."(3)

Again, Vishnu says: "An only son takes the wealth of a Brahmin if he be born of a Brahminee, Kshatriya or a Vaisya wife; of a Kshatriya, if born of a Kshatriya or a Vaisya wife; of a Vaisya, if born of a Vaisya wife. The Sudra son takes the wealth of a Sudra."(4) *Commentary*—Where a Brahmin has only one son by wives of the Brahmin and other castes, he takes the whole wealth, if he is a Brahmin, Kshatriya or a Vaisya son. So where a Kshatriya having two wives has only one son, whether Kshatriya or a Vaisya, such son takes the whole wealth. If a Vaisya has only

(1) Vishnu, Chap. XVIII, 1—27. (2) Cole. Dig., Vol. II, 314, CLV.
(3) Vishnu, Chap. XVIII, 38—40. (4) Vishnu, Chap. XVIII, 28—31.

a Vaisya son, he takes the whole. If a Sudra has only a Sudra son, he shall take the whole. The third wife of a Kshatriya and the second wife of a Vaisya being not recognized by the Vedas, they are not mentioned here. The same law applies where the third and the second marriages of the Kshatriya and the Vaisya respectively are illegal.

Vasishtha says: "Where a Brahmin has Brahmin, Kshatriya and Vaisya sons, the Brahminee son takes three shares, the Kshatriya sons, two, and the rest divide equally." (1) *Commentary*—'The rest' means 'Vaisya sons.' Here the texts of Vishnu and Vasishtha which lay down conflicting rules of division must be construed as not at variance with each other, regard being had to the relative superiority or inferiority of the co-heirs in respect of qualities.

Manu says: "All the sons of men of the twice-born classes born either of women of equal castes should allow a deduction in favour of the eldest and the rest shall divide equally." (2) *Commentary*—Where there are many sons begotten by men of the twice-born classes on wives of equal or different castes, then they should give the eldest an additional share and divide equally.

Again, Manu says: "But to a Sudra, a wife only of the same caste and none other is ordained. Although a hundred sons be born of her, they shall share equally." (3)

Baudhayana says: "If a man has sons by a woman of equal caste and a son by a woman of inferior caste, and the latter is virtuous, he shall take the share due to the eldest. The virtuous son becomes the supporter of the rest." (4)

Brihaspati says: "If the son of a Brahmin by a Kshatriya wife be the eldest by birth and excel in good qualities, he shall take an equal share with the son by a Brahminee wife; so also the son by a Vaisya wife." (5)

Gautama says: "The son of a Brahmin by a Kshatriya wife if virtuous takes an equal share with the eldest all except the deduction allowed." (6) *Commentary*—'All except, etc.,' means

(1) Vasishtha, Chap. XVII, 47—50.
(2) Manu, Chap. IX, 156.
(3) Manu, Chap. IX, 157.
(4) Baudhayana, II, 2, 3, 12 and 13.
(5) Brihaspati, Chap. XXV, 29.
(6) Gautama, Chap. XXVIII, 35 and 36.

'cows, etc.' The meaning is the deduction allowed in favour of the eldest son shall not be allowed in his case. Just as the son of a Kshatriya wife takes equal share with the son of the Brahmin wife, so where there is no Brahmin son and there are sons of the Kshatriya wife and the Vaisya wife, the son of the Vaisya wife if virtuous shares equally with the younger son of the Kshatriya wife devoid of good qualities. The meaning is that the son of the Kshatriya wife, like the son of the Brahminee wife in the previous case, does not get the share due to the eldest son. The same mode of division should be followed in the case of the Kshatriya and the Vaisya sons of a Kshatriya. So also with respect to the Vaisya and the Sudra sons of the Vaisya. Thus the rule of Baudhayana about allowing the share due to the eldest son should be observed in the case of the younger brother of the same caste and devoid of good qualities. Where the younger is possessed of good qualities he shares equally. There is thus no conflict of authorities.

Brihaspati says: "Land received as a reward of learning should not be given to a son born of a Kshatriya or inferior wife. Even if the father give it the son by the Brahminee wife may resume it after the father's death."(1)

Vriddha Manu says: "The son of the Brahminee wife alone shall take the land acquired by the aid of sacred literature; but all the sons by wives of the twice-born classes shall take the house as also land descended from ancestors."(2) *Commentary*—'*Brahmadayagatham*' means 'received as a reward for sacred literature and for officiating at sacrifices, etc., '*Dvijathayah*' means 'belonging to the three regenerate classes.' *Parijata* interprets the first expression to mean 'obtained as a reward for sacred literature' alone.

Brihaspati says: "A son begotten upon a Sudra woman by any of the twice-born classes shall take no share in land. The son who is by birth of the same caste with the father shall take the whole. Thus is the law settled. The only *Nishada* son of a Brahmin takes a third share of his wealth. Two shares shall be taken by *sakulyas* or by *sapindas*, or by the person performing the funeral rites. In default of kinsmen, the preceptor or the pupil who performs the

(1) Brihaspati, Chap. XXV, 30. (2) Cole. Dig., Vol. II, 317, CLXII.

obsequies shall take them. Under the most difficult circumstances let those shares go to any person of the same original stock."(1) *Commentary*—'Nishada' means 'son begotten by a Brahmin on a Sudra woman.' Thus a third share goes to the son by a Sudra woman, two shares to the *sapindas*; and in default, to the *sakulyas*; and in default of the *sakulyas* the preceptor or the disciple takes them. 'Under the most difficult circumstances' means 'in the absence of all the *sapindas*, *sakulyas*, etc.' Then let the shares be given to anybody belonging to the same *gotra* with the deceased father of the *Nishāda*. Pārijāta says that this rule applies where the *Nishada* son is possessed of good qualities.

Vishnu says: "A Sudra being the only son of twice-born men, shall take half the wealth; the devolution of the second half is the same as that of the wealth of the sonless deceased."(2) *Commentary*—'Twice-born men,' *i.e.*, Kshatriyas and Vaisyas, Brahmins excepted, because the Sudra son of a Brahmin has been declared by Devala to take a third share. The second half belongs to the Brahmins.

Manu says: "Whether a Brahmin has sons, or whether he has no sons (by wives of the twice-born classes), he shall not, according to law, give more than a tenth share to a Sudra son. A son by a Sudra wife is not heir to his Brahmin, Kshatriya or Vaisya father. Whatever his father give him, that alone is his wealth."(3) *Commentary*—Having sons by twice-born women or not. Here Lakshmidhara says, that when the father is pleased to give anything to the son by the Sudra wife, then he shall give only a tenth share. According to his view, therefore, a son by the Sudra wife is not heir, but takes the share of the wealth given him by the father. By Halāyudha and Pārijāta, the first verse has been explained to apply to the son of a Sudra wife altogether devoid of good qualities and the second to the son of a Sudra concubine devoid of good qualities, both denying his right to share.

Brihaspati says: "A Sudra son, virtuous, attending upon and doing service to his sonless father shall receive maintenance and the *sapindas* shall take the rest."(4) *Commentary*—This rule

(1) Brihaspati, Chap. XXV, 32. The rest not found in Brihaspati. This is quoted as an extract from Devala in Cole. Dig., Vol II, 320, CLXV.

(2) Vishnu, Chap. XVIII, 32—33.

(3) Manu, Chap. IX, 154—155.

(4) Brihaspati, Chap. XXV, 31.

applies to a son by a Sudra woman not married, because the word '*aparigrihitasu*' must be read into this verse also.

On this point, Gautama says: "The son by a Sudra woman also, if doing service to his sonless father, shall have something for his livelihood like the disciple." (1) *Commentary*—The meaning is that the son by a Sudra woman not married shall, in the absence of sons of the three regenerate classes, obtain something for his livelihood, such as agriculture, etc., if he has been serving and propitiating like a disciple.

Sankha and Likhita say, that he shall take what his father gives him. "The son by a Sudra woman takes no share. Whatever his father gives him, that alone is his portion. He should be given a pair of cows, not the best, black metal and black grain, except gingily seeds."(2)

Gautama says: "As in the case of the Sudra son, so in the case of *Pratilomas*."(3) *Commentary*—Sons born of other castes like the son of the Sudra woman shall obtain their livelihood, like the disciple. This is the meaning.

Manu says: "A son begotten by a Sudra on his female slave or the female slave of his male slave may take a share if permitted. This is settled law." (4) *Commentary*—'Female slave' is one answering to the description contained in the verse beginning 'taken under a standard,' etc. 'The female slave of his male slave,' *i.e.*, the female slave of a male slave answering to the description above noted. One begotten by a slave upon a maiden by permission is also so regarded. This is settled law. Kalpataru says, that 'the female slave of the male slave' means 'the female slave of his servant.'

Yājnavalkya says: "The son though begotten by a Sudra upon a female slave may become a sharer by his father's choice; but after his father's death, his brothers shall give him half a share." (5) *Commentary*—'*Kamatah*' means 'by his father's choice.' 'Become a sharer' means 'obtain a share.' If after the father's death his sons by married wives shall exist, then they shall give the son by the female slave half their own share. This is the meaning.

(1) Gautama, Chap. XXVIII, 39. (2) Cole. Dig., Vol. II, 323, CLXX.
(3) Gautama, Chap. XXVIII, 45. (4) Manu, Chap. IX, 179.
(5) Yājnavalkya, Chap. II, 133 and 134.

In default of sons by women duly married the same author says: "If he have no brothers, he shall take all the wealth in default of daughter's sons." (1) *Commentary*—In default of sons by wives duly married, of the wife, of her daughter, and of her son the son of the female slave certainly takes the wealth after his father's death.

Here ends the chapter on 'Partition among sons unequal in caste.'

CHAPTER XIV.

On the rights of a son born after partition.

On this subject Manu says: "A son born after partition shall take the father's wealth alone, or shall share it with such of his brothers who live in re-union with him." (2) *Commentary*—Where the sons divide with the father and a son is afterwards born, he takes all the father's share after the father's death. If the father is alive, he takes only a share of the father's property. The particle '*eva*' (alone) indicates that he takes nothing of the shares of the divided brothers.

Brihaspati says: "Where the sons by the same or different wives divide with the father, the sons born after the partition shall take the share allotted to the father. A son born before partition shall have no claim on the father's wealth, nor a son born after it, on the share of his brother." (3) *Commentary*—'*Purvajah*' means 'born before partition,' hence, divided. This son has no claim on the father's share. '*Vibhakthajah*' means 'son born of the divided father.' He has no claim on the brother's share. This is the meaning.

The same author says: "Whatever a father acquires after division with his sons, goes to the son born after partition. Sons born before partition are declared to have no claim to it. As in property, so in respect of debts, gifts, mortgages and sales, they have mutually no claim upon each other except in the matter of pollution and libations of water." (4)

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(1) Yājnavalkaya, Chap. II, 134. (2) Manu, Chap. IX, 216.

(3) Brihaspati, Chap. XXV, 17 and 18. (4) Brihaspati, Chap. XXV, 19 and 20.

Yājnavalkya says: "A son born after partition of a wife of the same caste takes a share; or his share may be of property after calculating receipts and disbursements."(1)

Vishnu says: "Sons divided with the father shall give a share to a son subsequently born."(2) *Commentary*—These two texts apply to cases of sons in the womb at the time of partition and born after it. By this it is declared that to the son in the womb at the time of partition and born after it, the divided sons should give his share, making it up from their own shares. To the son not so conceived but born after partition, the share of the divided father alone, according to the view of Manu and others, belongs, in view to the fact that his existence in the womb at the date of partition may not be visible; if the pregnancy was undoubted, there can be no partition at all. So says Prakāsakāra. Halāyudha, however, quotes Yājnavalkya's text after quoting Vishnu's and explains it as follows: "If the son born, after the partition, of a wife equal in caste is possessed of good qualities, then he takes a share of all the wealth previously divided—tangible or otherwise. If not excellent in good qualities, he takes his share only of tangible properties, such as land, etc., and the produce thereof after deducting the debts contracted by the brothers."

Here ends the chapter on 'the rights of a son born after the partition.'

CHAPTER XV.

On the rights of an heir absent at, and returning after, partition.

On this subject, Brihaspati says: "Where an heir appears before or after partition, and believes he has a claim on the wealth, he takes a share in it."(3) *Commentary*—"*Bhāvayati*" means "thinks (I have a share in this)."

The same author says: "Of debts, wealth secured by documents, house and land descended from the grandfather, he shall take his share of them, though he has been long absent in a foreign

(1) Yājnavalkya, Chap. II, 122. (2) Vishnu, Chap. XVII, 3.

(3) Brihaspati, Chap. XXV, 22.

country. If a man leaves his family and lives in another country, his share should undoubtedly be given to his male descendants when they appear. Whether he be the third or the fifth or even the seventh, he shall, on clear proof of his birth and name, receive the share that gradually descends to him."(1). *Commentary*—The text of Devala that 'male descendants within the fourth degree shall take, etc.,' applies to cases where they are living together and other similar cases. But this rule applies to cases where they are living in countries difficult of access. There is thus no conflict.

The same author again says: "To the descendants of the man who is well-known by tradition among neighbours to have been the proprietor, his kinsmen shall deliver the land."(2)

Here ends the chapter on 'the rights of an heir absent at, and returning after, partition.'

S. SITARAMA SASTRI.

(1) Brihaspati, Chap. XXV, 23 and 25. (2) Brihaspati, Chap. XXV, 26.

NOTES OF INDIAN CASES.

Raghavendra Rau v. Jayaram Rau, I. L. R., 20 M., 283. Many texts of the Hindu Law in the matter of who is eligible as a bride are not only merely hortatory, but even fanciful. *Subrahmania Aiyar* and *Benson*, J. J., held that the text of Asvalayana against the marriage of a wife's sister's daughter is not prohibitive, and their Lordships are fully borne out in their view by the evidence let in as to the usage prevailing in Southern India. As a matter of fact even texts prohibitory in their nature have been disregarded in practice and customary law is much laxer than the texts, especially as to forbidden relationships on the maternal side.

Thillai Chetti v. Ramanatha Ayyan, I. L. R., 20 M., 295. When a mortgagee is also part owner of the equity of redemption, it is clear law that the owners of the remainder of the equity of redemption cannot sue to redeem the whole property. They must sue to redeem their shares only, and for that purpose should have the shares ascertained. *Mamu* v. *Kuttu*, I. L. R., 6 M., 61. It is difficult to see why the Reporter suggests in his head-note that all the mortgagors together could in such a case sue for redemption of the whole property. We can find nothing in the judgment to support the suggestion.

Venkatanarasimha Naidu v. Dandamudi Kotayya, I. L. R., 20 M., 299. We hope the judgment of *Subrahmania Aiyar* and *Benson*, J. J., in this case will set at rest the doubts that have long existed with regard to the onus of proof on the question of the nature of the tenancy when a Zemindar sues to eject a tenant. Their Lordships hold that the rule of English Law that a tenancy is presumed to be one from year to year in the absence of evidence to the contrary is not applicable to holdings in zemindaries in this country. The zemindar is generally the assignee of the Government's share in the produce of the land. Such share is really of the nature of a tax, and the Government never put forward any right to dispose of the land except for the purpose of realising its revenue. The tenant's right of proprietorship in the soil subject to such right was always recognized. There is, therefore, no ground for the presumption that the tenancy is a yearly one and for calling upon the tenant to prove that he has a larger right. The landlord suing in ejectment must therefore prove that he has a right to eject by proving the nature of the tenancy and its determination in one of the modes provided by law. The decision will not affect the applicability of the presumption of English Law in cases of ryotwary holdings generally.

SUMMARY OF RECENT CASES.

Divorce—Judicial separation.

Russell v. Russell [1897, Appeal Cases, 395.]

This case which has been for some time engaging the attention of the legal world, has at last been decided in favor of the Countess of Russell. The law on the subject of divorce has been most elaborately dealt with in the several judgments of the members of the house, and, although the prevailing judgment of the house was only that of a small majority, historically speaking, that judgment seems to be the correct one. We may say with Lord Herschell that "any change must only be made by legislation and that our duty on the present occasion is to administer and not to make the law." The Earl and the Countess of Russell were married in the year 1890. Soon after the marriage they disagreed and separated. The Countess presented a petition praying for a judicial separation on the ground that her husband has been guilty of an odious crime with one Mr. R. The jury, however, acquitted the Earl of all the charges made against him and the petition of the Countess was accordingly dismissed. In spite of this verdict of the jury, the Countess went on reiterating the same thing both in public and private

and persisted in asserting that her husband was guilty of the abominable offence without an honest belief in its truth. The Earl thereon brought this action for judicial separation on the ground of cruelty. The majority of the House held that the acts of the Countess did not amount to legal cruelty to entitle the Earl to a judicial separation. *Lord Herschell,* who delivered the leading judgment of the majority of the House, said: "I think it may confidently be asserted that in not a single case was a divorce on the ground of cruelty granted, unless there had been bodily hurt or injury to health, or a reasonable apprehension of one or other of these. And it may with equal confidence be asserted that no other test was ever applied when it had to be determined whether a sentence of divorce on the ground of cruelty should be pronounced."

Parol evidence—Written agreement.

Bank of Australia v. Palmer [1897 Appeal Cases, p. 540.]

The decision in this case would be very useful to our courts in the construction to be put upon Ss. 91 and 92 of the Indian Evidence Act. It was decided in this case that when parol evidence relates to the circumstances under which a person's name was appended to a document, it could be adduced to prove those circumstances, the name not being part of the agreement.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Law of Consent (with special reference to Criminal Law including the doctrines of Mistake, Duress and Waiver) by Hukm Chand, M.A.:—Published by *the Bombay Education Society's Press, Byculla.* Price Rs. 15.

The Specific Relief Act with commentaries, by Mahendrachandra Mitra, M.A., B.L.:—Published by *Mukerjee and Co., Calcutta.* Price Rs. 5.

The Albany Law Journal for October & November (*in exchange*).
The Educational Review for October & November (*in exchange*).
The Calcutta Weekly Notes for October & November (*in exchange*).
The Allahabad Weekly Notes for October & November (*in exchange*).
The Green Bag for October & November (*in exchange*).
The Canada Law Journal for October & November (*in exchange*).
The Canadian Law Times for October & November (*in exchange*).

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Lawyers and their Clerks:—The Registrar and the Deputy Registrars in our High Court are possessed of a considerable amount of imagination

and zeal which are not always exercised to the advantage of the profession or the public. Their imagination is exercised in discovering defects in the working of the High Court where none was known to exist before, and their zeal, in framing rules to remedy such defects. One of the recent discoveries made by the Registrar is that inconvenience is caused to the office in the High Court by the practice of lawyers having more clerks than one to transact their business in the High Court. For our part, we fail to see where the inconvenience lay in the old system, which had been working for more than a generation. The Registrar, however, has passed a rule that the Court should not permit any practitioner to transact his business in Court through more than one clerk. The rule is one calculated to cause great inconvenience and annoyance to the profession. In the case of any vakil with any considerable amount of practice, it is not possible to get on with his work with the help of a single clerk. Owing to the inefficiency of the printed papers department, the purchase of the necessary papers involves a scandalous waste of time and requires the services of a special clerk for that purpose. The work to be done in court by a clerk is often pressing, and if he has to wait at the counter of the clerk in charge of the printed papers for hours together, it is not possible to utilize his services for other emergent work, such as the presentation of appeals, etc. The illness or absence of a clerk even for a day must necessitate an application to the Registrar by the practitioner to permit a substitute for the clerk originally nominated. The transaction of business will be greatly impeded by having to wait till the recognition of the substitute by the Registrar, more especially, when the illness or absence of the clerk is sudden or unforeseen, or occurs during the absence of the practitioner himself from the station. Inconvenience is also likely to be felt in deputing for the tranaction of business in court a clerk who from want of opportunity may not possess the necessary amount of familiarity with the machinery of the court and its working.

The new rule is sure to multiply correspondence with the Registrar and cause loss of time both to the Registrar and to the practitioners. We are sorry we cannot congratulate the Registrar upon the wisdom of his rule.

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Depositions on the Original Side of the High Court:—It will startle many of our readers to be told that no formal record is now made of the depositions of witnesses in the Original Side of our High Court, and that it is not possible to procure any authoritative version of the evidence given by a witness. Till a few months ago, the evidence used to

be recorded by the Judge, and certified copies of the Judge's notes of evidence were granted to suitors. But it has been recently discovered that the Judge's notes are his own private property and that copies of them should not be furnished to the parties. The credit of this discovery belongs to our new Judge Mr. Justice Boddam. The result is that practitioners have to rely upon their own notes only, and incur the risk of being contradicted by the appellate judges by reference to the Judge's notes to which they have no access. Rule 355 of the rules of the High Court, which relates to appeals from the Original Side, contemplates the printing of the evidence recorded in the case. But there will be no evidence to be printed hereafter. It is urged that a Judge of the High Court should not be converted into a clerk and compelled to take down depositions at length. But no one desires to do so; and everybody will be satisfied if a competent Bench Clerk is deputed to take down the depositions as they are given. There is no reason why the system which is adopted in all the mofussil courts throughout the Presidency should not be also adopted in the Presidency Town. Considering the importance of the matter, the Government ought not to grudge any additional expenditure that may be necessary for this purpose; more especially, when it is borne in mind that the Government derives nearly eighteen lakhs per annum from its administration of justice. As things now go, a conviction for perjury is practically impossible. The Judge's notes are not legal evidence; and still less are the Counsels' notes admissible. The evidence on a charge of perjury must consist of the testimony of persons who heard the witness make the statements which are the subject of the charge, and it would not be always safe or reliable to act upon such testimony in matters of this kind. A witness might have made a statement at one time, and might have in the course of the deposition explained it subsequently. It is not possible to make sure that persons who have heard the witness give his evidence have carefully attended to, or remembered everything told by the witness. We hope, the Judges of the High Court will see their way to recommending the entertainment of a competent clerk to take down the depositions of witnesses as they are given.

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Law Reporting in India:—We have often animadverted upon the methods of law reporting in this country, and we have again to draw attention to one of the most serious defects in the system, viz., the want of a current index like the one published in England in connection with the English Law Reports. The digest published by Mr. Woodman under the auspices of the Government are published only at long intervals, and

between the publication of the last digest and the appearance of a new one, there is no digest of cases reported during the interval. A practitioner who is in search of an authority has to refer to four times as many volumes as there are years for which there has been no digest. But what is even more annoying is the trouble involved in finding out authorities in the current series for any year. The practitioner might have to turn over 48 parts of the Reports before he could make sure that there was or was not a decision bearing upon the point engaging his attention. It might be said that the field is open to private enterprise. But, we think, it falls more appropriately within the legitimate duties of the publishers of the reports. We think, the Government ought to insist upon its Law Reporters' publishing current indexes every quarter as in England. It would also be of great use to the profession if the statutes of the Government of India be published with the Reports. Any extra expenditure that may be incurred can be easily met by a slight increase in the subscription.

We may add that the defects we have pointed out have also been noticed by Sir Frederick Pollock, in the preface to his Tagore Lectures on Fraud and Mistake and have been severely condemned.

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The Hindu Gains of Learning Bill:—Mr. Bhashyam Aiyangar's Gains of Learning Bill has at last been introduced into the Council. We noticed it at length at the time when leave was obtained for its introduction. Though six years have elapsed since that date, the Bill has undergone no change. It will be therefore unnecessary for us to offer any remarks upon it in addition to what we have made. The responsibility for delay is not however with the author. It only illustrates the difficulty which a private member has in introducing a Bill into an Indian Legislature. The Bill had of course to be submitted to the Government of India and the Secretary of State; and the opinions of Associations and of leading public men had also to be taken. Sanction has been accorded by the authorities concerned for the introduction of the measure. There is a considerable preponderance of opinion in its favour, judging from the views of the bodies and individuals consulted.

We have found it, however, difficult to understand the attitude of several of the non-official members who spoke upon the Bill at the last session of the Legislative Council. It is much to be regretted, these gentlemen have failed adequately to realize the value of the measure. The Bill tries to render certain what is involved in doubt and to make

clear what is believed to be obscure. If it can be regarded as effecting any change in the Hindu Law, such a change is in the direction of promoting peace and good will among the members of the joint Hindu family and furthering individualism. The only objections that have been urged against it are that it will cause the disruption of Hindu families, and that it will retard the higher education of junior members. We cannot think that there is any force in them. We believe family affection has not died out among Hindus so as to require mercenary considerations to support it. Education is imparted in other countries where there is no joint-family system, not with the prospect of the recipient of that education recouping to the family the expenses incurred by the family, but out of affection and the love of honour and fame. We see no reason why it should be different in India. We hope that when the time comes for the motion that the Bill be passed into law, the non-official members will overcome their difficulties and will vote straight for the measure.

The honorable member in charge of the Bill commands the confidence of Government as a perfectly safe and sound man. And if he cannot succeed in getting a measure through the Council which is undoubtedly beneficial to the community, we fear the day may never come when a non-official member will be able to pilot any legislation through the Council. If Mr. Bhashyam Aiyangar be successful in this, his first endeavour to introduce useful legislation, there is good reason to hope that he will follow it up by other measures of public utility.

The importance of private members seeking to rectify the erroneous action of the courts or the mischievous consequences of judicial legislation is now very great. Most lawyers in the country have begun to feel that the High Courts are beginning to command less and less confidence. The *personnelle* of the High Courts is becoming deficient in talent. Whether this is due to a decadence in the Civil Service or to the civilian's course of training in the country, or to the inferiority of the Barrister Judges sent out from England or to the depreciated rupee, there is no gainsaying the fact that the High Courts of India do not inspire the same confidence that they did 25 years ago. There is no European Judge now in the country who can be said to be a good Hindu lawyer. Nor are there very brilliant specimens of legal acumen in respect of other departments of law. Although we are extremely unwilling to add it, we must not fail to voice the feeling that even the Privy Council has lost somewhat of its ancient reputation. Under these circumstances it is inevitable that mistakes should be committed by courts. They can only be rectified by the Legislature. We may also point out that, when

on one occasion the question of dancing girls making an adoption came before the High Court of Madras, the distinguished Judge who had to deal with it declined to set aside the custom in consequence of a supposed growth in the moral sense of the community; he said that there was an active legislature which might put the law on a proper basis. We may ask where is that active legislature, if even a first effort in the direction of reform in the Hindu Law is to meet with opposition of one kind or another. If the reform is good, and in the right direction, we can see no justification for the opposition. The Privy Council by one stroke of the pen revolutionised the Hindu Law in the Southern Presidency, by declaring all zemindaries alienable at the will and pleasure of the individual holder. What have our conservative lawyers and supporters of the orthodox Hindu Law done to correct the action of the Privy Council; and why should any opposition be raised, because Mr. Bhashyam Aiyangar introduces a small Bill dealing with a vexed question of considerable difficulty and settling it in a simple, just and beneficial manner. We can multiply instances of the erroneous and sometimes ignorant action of the courts producing serious consequences. We think it is the duty of right-minded men who have the welfare of this country at heart, to consider the measure dispassionately and carefully, and lend their support to it.

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How far may Judges be criticised ;—The decision of the Supreme Court of Wisconsin in the now famous Eau Claire contempt case, not only makes very interesting reading, but constitutes one of the most emphatic vindications of the rights of free speech and free criticism which we have had from the bench in a long time. It may be well to recall the salient facts of this remarkable case. Judge Bailey of Eau Claire, who was a candidate for re-election last spring, objected to certain editorials and communications in a local paper severely animadverting upon his official conduct and methods. The writer and editor having filed affidavits in contempt proceedings (instituted against them by the judge) alleging the truth of their charges of unfairness, partiality and incapacity against Judge Bailey, he angrily refused to proceed wtih the hearing and made an order adjudging his critics guilty of contempt. The offenders were to be committed to jail, but a writ of prohibition from the Supreme Court saved them from that punishment. The Supreme Court, in reviewing the case, points out the fact that the criticisms made upon Judge Bailey had no reference to any action of his in connection with a case then pending. Whether just or unjust, they were general in their nature, and referred to past conduct. The court

says it is well persuaded that newspaper comments on cases finally decided prior to the publication cannot be considered criminal contempt, and that they do not obstruct the administration of justice, however much, they may tend to prejudice the judge against whom they are directed. While it is of the first importance that judges should perform their grave duties unimpeded, it is equally important that the right of citizens and newspapers to criticise what they deem arbitrary, unworthy and corrupt conduct should be jealously preserved. The court says: "Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding whereby a candidate for office becomes the accuser, judge and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such doctrine is that all unfavorable criticism of a sitting judge's past official conduct can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press and subvert freedom of speech we do not know where to find it." This is a stinging rebuke, but justly deserved, and one needed to remind arrogant and dictatorial jurists that they are no more above proper criticism than are any ordinary individuals. To slightly paraphrase the poet: "No divinity doth hedge about a judge," least of all at a time when he is a candidate for office. The law provides adequate remedies for unjustifiable attacks upon their character, but does not permit the summary fining and imprisonment of critics, even when their criticisms go beyond what may be deemed proper limits, provided such animadversions do not clearly tend to obstruct the administration of justice in a then pending case :—*The Albany Law Journal.*

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A Poll Parrot on the witness stand :—Poll parrots are often known to talk, and are frequently noted for their garrulity, but it isn't every day that one of these feathered favorites takes the witness-stand in a court of law, and has his or her evidence recorded by a stetnographer. Such an incident, however, enlivened Judge Van Wart's civil court in Williamsburg the other day, when, after the filing of heaps of affidavits and the taking of much oral testimony in the attempt to determine the ownership of a parrot, the judge finally decided to let the much-coveted bird speak for itself. "To my mind," sagely remarked his honor, "the parrot is the missing link in this chain of conflicting testimony, and its presence will decide its rightful ownership." One John Kleinholz had possession of the pet, which is described as being endowed with extraordinary intelligence and an unusually large, lurid and picturesque vocabulary. Kleinholz asseverated most

positively that he had bought the bird from a shipwrecked mariner who had sailed the Spanish main. On the other hand Samuel November, the plaintiff in the action, contended that the bird was his, having strayed away from his home and been captured by his neighbour, Kleinholz. When the case was called for the thirteenth time, Judge Van Wart ordered the marshal to bring in the parrot. This was done, the bird being in a gilded cage, and Kleinholz was commanded by the court to "tell her to come out of her cage and take the stand.' The wise bird, instead of complying, removed a beakful of flesh from one of the defendant's fingers and cried, in such good English as to astonish the judge: "Go away ! Go away ! Polly wants papa !" The plaintiff, November, then tried his luck, with far different results. As the plaintiff in the suit approached the cage, the bird is described as having smoothed her ruffled feathers, cocked her head to one side to peer into his face, and sidled along the perch confidingly in his direction. When he inserted his hand in the cage she held out one foot and then hopped blithely into his palm. The veracious chronicler of what happened in the court on this interesting occasion continues: "'Kiss papa !' said November, in a voice choked with emotion. He lifted the bird to his face, and she pecked gently at his lips, croaking gravely, 'Polly's papa !' And when November repeated to her the judge's injunction that she should tell the truth, the whole truth and nothing but the truth, she murmured, rubbing her crest against the plaintiff's chin, 'Polly's a good Polly.' Only once thereafter did the bird show agitation, and that was when Kleinholz approached her again, at the judge's command, to see if she would talk to him. Polly uttered a screech and took wing to the window whence no one but November could coax her to descend. That settled it. November was adjudged Polly's rightful owner, and Kleinholz left the court with a threat to sue for the bird's board and lodging.":—*The Albany Law Journal.*

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Registrars and the work they do;—There are eleven registrars attached to the Chancery Division, each of whom receives 1,500*l.* a year. In theory, their duty is to be present in Court when a case is heard, to take a careful note, and afterwards, with the assistance of counsel's briefs, to put the judgment in proper form on paper. This, it is naturally assumed, requires a man of skill and experience. What are the facts? In any complicated matter the judge directs minutes of the judgment to be signed by the junior counsel engaged in the case. When the order is a simple one, it follows the form in a well-known precedent book. As for the registrar's presence in Court, if the case

lasts more than one day there is a different registrar. Thus half a dozen registrars may be present in turn during the hearing of a case, but it is only the last one who eventually draws up the judgment.

Orders made by a judge sitting in chambers are also settled by the registrars, though, quite rightly, no registrar is present when the order is made. Minutes of the order are prepared by the junior clerks of the judge and sent to the registrar, without the parties previously seeing them. Even if the registrar and the parties all agree that the minutes are incorrect, the registrar cannot alter them without their being first returned to the chambers of the judge. Thus, even if the registrars were, as a body, as efficient as officials might reasonably be expected to be whose capabilities are valued at 1,500*l.* a year, their talents would be wasted.

The position is simple. The registrars are but little assistance to the judge, and the system is the cause of constant delay to the suitor. Shorthand-writers, one to each judge, would far more readily save the judges' time and trouble, at an expenditure amounting to about a quarter of the total of the salaries of the registrars, without taking into account those of the numerous clerks, about twenty in all, attached to the registrars' department. If the registrars were abolished, judgments and orders would be drawn up with far less delay, and no less accuracy, than now, and there would remain, after creating a liberal pension fund, enough to provide the salary of an additional judge, as well as the salaries of the shorthand-writers, with a large saving of expense in the immediate future, and the disappearance of an unnecessary and inefficient department.—*The English Law Journal.*

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We take the liberty of extracting the following interesting article on "Obiter Dicta" from the *Albany Law Journal.*

OBITER DICTA.

"OBITER DICTA," said John A. Finch at the recent banquet of the Indiana State Bar Association, "is not statutory Latin, and we have no information as to how the words would have been translated by the commissioners who prepared our first Code, had they been required to make such an attempt. The law dictionaries and the courts translate these words as a phrase, and give us rather an exegesis than a translation. 'Dicta,' says a judge of the New York Court of Appeals, 'are opinions of a judge which do not embody the resolution or determination of the court, and made without argument or full consideration of the

point: they are not the professed, deliberate determinations of the judge himself. Obiter dicta,' he says, 'are such opinions, uttered by the way, not upon the point or question pending, as if drawn aside for the time from the main topic of the case to collateral subjects.'

"An old judge is quoted as saying: 'An obiter dictum, in the language of the law, is a gratuitous opinion, an individual impertinence.'

"I am not much of a dictionary-maker, but I believe I could improve upon either and say: "An obiter dictum is the passing opinion of a judge expressed when it is not called for,'

"A great judge was asked: 'What is the difference between law and equity?' 'Very little in the end,' responded his lordship; 'at common law you are done for at once; in equity you are not so easily disposed of. The former is a bullet which is instantaneously and charmingly effective; the latter the angler's hook, which plays with the victim before it kills him. Common law is prussic acid; equity is laudanum.'

"Whether a man goes down with a law bullet in a vital part or is wearied out as is the fish before being landed, where he may gasp his life out; whether he dies with one convulsion after a swallow of prussic acid or dreamily passes away in the solace of an opium overdraught, is perhaps no matter in the end. In the processes there is a vast difference, but the tombstones—the reports of that court which has the last say—read very much alike. The figure is perhaps not a bad one.

"There is a deal of difference in what should be on the monument and what is on it, and there is equal difference in what should be in the opinions of the courts of last resort and what the judges speaking for the court find time to inject. The elegies and eulogies on the plain memorial slab and the massive monument are often obiter—not meant seriously—and superfluous. The judges of the law courts in bank and the chancellors in their meditative chambers are as much given to superfluous utterances as are the *postmortem* inscriptions in marble. Obiter dicta is a vice common to both.

"A child wandering in a cemetery, after reading the effusive inscriptions, all too superfluous after the statement that a dead man is below, asks where the bad people are buried. A reader of reports, searching for authority, sighs that so much is said when so much less would amply suffice.

"We are taught that we may disregard all obiter dicta, but as we are never sure what the law in a given case is untill some court has

given an opinion in the reports, equally are we never sure what is unnecessary law, the obiter dicta of an opinion, until some later court so informs us. That which we have for years quoted as authority is, in later expression, stripped of its conclusiveness and made simply an impertinence. Not only does the superfluous expression which has been cited or acted upon as decisive become indecisive; it becomes a reproach to the judge who wrote it.

" This sort of thing reminds one of what Artemus Ward said in his lecture on the Mormons;

One of the principal features of my entertainment is that it contains so many things that don't have anything to do with it.' We have been succeeding or failing because of something in an opinion which turns out to have no right to a place in the judicial utterance. A man who has carefully wound up his clock every night for twenty years and then learns that it is an eightday clock has less reason for feeling bad than a lawyer who has lost a case or been guided in advice given by something that turns out to be obiter.

" After having bowed to the supposed law, as found in an opinion of a high court for years, we are suddenly told that the judge who wrote the opinion was ' off his base,' so to speak, and what he said was not the law at all, or, at least, he had no business to have then said it was the law.

" Take the case of the *Home Insurance Company* v. *Morse*, in which the Supreme Court of the United States held that a statute of Wisconsin requiring an insurance company of another State to agree that it would not remove a case against it to the United States Circuit Court was 'illegal and void,' and therefore, not binding on the company. Then read, and rub your eyes as you read, the same court in *Doyle* v. *The Continental Insurance Company*, in which it was held that the State may prescribe any condition that it may deem proper, whether constitutional or not, upon which corporations of other States may enter its borders, using language which was long held as a sword over companies that contemplated taking a case to the United States Circuit Court in that State, or in other States having a like statute. Years afterward we have from the same court (*Barron* v. *Burnside*), in which it was held that the ominous part of *Doyle* v. *The Continental Insurance Company* was obiter dictum; holding further that no conditions can be imposed by a State upon corporations foreign to it which are repugnant to the constitution and laws of the United States. Such an episode reminds

one of the trick on Falstaff that was 'argument for a week, laughter for a month and a jest forever.'

"Borne says: 'Nothing is permanent but change.' And so we have to say of the law. We can never rest secure upon any opinion until we have searched later reports for an opinion modifying or reversing it or declaring some of its vital parts obiter dicta.

"Polonius asked Hamlet, what he was reading. 'Words, words, words,' said Hamlet, and called the writer a 'satirical rogue.' Ben Butler was seen in a railroad train reading what appeared to be a law book, and was asked: 'Are you reading law, general?' 'No,' said he; 'only a volume of Massachusetts reports.'

"There are 166 volumes of Massachusetts reports, 165 volumes of United States Supreme Court reports, and hundreds and thousands of reports of other States. Every year adds to the reports of the courts of this country abont 250 volumes and about 60 volumes of text-books. 'Words, words, words.' Ben Butler to the contrary notwithstanding, all of these words are law unless they have been pronounced obiter dicta.

"Does anybody believe we can allow our presses to go on for-ever belching out books that are of such value that every lawyer must know what is or what is not in the motley throng before he can feel safe? Nay, verily. There must, in some way, from somewhere, come relief.

"The supposed great library at Alexandria was destroyed by the men of Mohammed for the, to them, satisfactory reason that if the books in it agreed with the koran they were unnecessary, and if they did not agree with it they were unsound. Will ever some devoted advocate or some legions of such devotees of the real law—the red-eyed kind, if you please—arise and settle this question by a conflagration?

"Oliver Wendell Holmes said he doubted not that if all the medicines in the world were dumped into the sea it would be a great deal better for the human family, though a great deal worse for the fishes. Some such remark could be made about our voluminous libraries. If something violent should happen to all the law reports now crowding our shelves, and all, or nearly all, of the books of alleged authors on particular branches of the law—such books being in the main a product of scissors, paste pot and a $10-a-week drudge—would anybody suffer?

"A long time ago an old man wished that his adversary would write a book. It needs no argument to prove that no lawyer ever said that;

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our enemies have written books, lots of them; too many of them, such as they are: and the spoiling of paper goes merrily on. 'Much study is a weariness of the flesh,' it is true, but winnowing chaff for an occasional grain of wheat is more weariness still. Are we for-ever to roll at the ever increasing stone of Sisyphus, or shall we make some effort to relieve ourselves and our successors?

"I am myself a lecturer on a branch of the law in a reputable law college. At the beginning of my course, or at the end, or, mayhap, many times *ad interim*, I tell my classes there is no logical, coherent, justifiable law on the subject; that there are decisions galore, and that those decisions will control in the trial courts, not because they are right, but because they are decisions bound in calf, or sheep, or hide of some other animal. I advise them to scorch well these volumes in animal skins, and say that the lawyer who finds most opinions leaning his way will succeed the best. It is not a question of logic or elementary law of the sort that is the 'perfection of reason.' It is simply a question of numerical strength. 'The Lord is on the side of the heaviest battalions,' said Napoleon.

"Indiana has more courts and more judges and annually issues more reports than all England. Our reports seem to get more voluminous and contain less law. The first volume of Blackford has 432 pages and contains 504 cases. The last volume of Indiana reports has 700 pages and 179 cases. Comparison of the first and last volume of reports of any other State will show like numerical results. Does this signify? Yes, verily, it does signify. It signifies all too much. Do lawyers at the bar or judges on the bench carefully reason or copiously remember? Is the law a matter of reasoning or is it a matter of searching for cases in point?

"Obiter dicta might be applied to many a volume in its entirety, to many a page of opinion for its mere prolixity.

"Men and brethren, what shall we do to be saved?"

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The Madras Law Journal.

PART XII.] DECEMBER 1897. [VOL. VII.

AMENDMENT OF THE LAW OF SEDITION.

Seldom has a more momentous piece of legislation been brought forward before the Vice-regal Council than the proposed amendments in the law of sedition of which notice has been given by the Government, and which will have to be considered by the Council during the present session. These amendments are said to have been suggested by the recent prosecutions for seditious writings in this country and to be the result of a cool and deliberate consideration on the part of the Government. We must, in the first place, render our thanks to the Government for its rejection of the proposal to re-enact a press law similar to the Vernacular Press Act of 1878, and for its refusal to differentiate between journals with reference to the language of publication. While declining to yield to the demand in certain quarters for the enactment of a Vernacular Press Act, the Government have felt bound to propose certain amendments in the Indian Penal Code and the Criminal Procedure Code with the object of bringing offenders against the law of the land more promptly to book. The reasons adduced for the introduction of the amendment of S. 124-A are, that the language of the section as it stands is not sufficiently clear and explicit, and that it is desirable to bring the law more clearly into accord with the law in England. It is pointed out by the Honorable Mr. Chalmers that, with the exception of the clause relating to the promotion of ill-will between different classes of Her Majesty's subjects, the proposed amendment in no wise alters the law at present in force in India. Admitting as the Honorable gentleman does, that the High Courts of Calcutta, Bombay and Allahabad have substantially agreed in their interpretation of S. 124-A and interpreted it in accordance with the English law, it would seem that the language of the section is not after all so doubtful

or obscure as to call for amendment. If the different High Courts had taken different views of the law, it would certainly have been necessary to set the matter at rest by a clear and authoritative enunciation of the law. But the mere fact that the decisions adopted in Bombay, Calcutta and Allahabad are not technically binding on other High Courts does not appear to be a sufficient reason for the amendment in the absence of any ground for an apprehension that other High Courts will not follow the same view. It is somewhat unusual to find the Legislature considering the advisability of amending a provision of law, merely because counsel for the defence in certain cases have contended for a particular interpretation of it, while, as a matter of fact, that contention has not prevailed with any of the superior courts, and the section has been interpreted by all those courts in the very manner in which the Legislature thinks it ought to be interpreted. Mr. Chalmers is right in stating that it was the intention of the late Sir James Fitz-James Stephen in introducing the present section 124-A to assimilate the law in India to the law in England. But as to the success of the attempt, Mr. Chalmers evidently holds a different opinion from that held by Sir James Stephen himself. While it was the opinion of Sir James Stephen that the present section (proposed by him) "was substantially the same as the law of England at the present day, though it was much compressed, much more distinctly expressed and free from a great amount of obscurity and vagueness with which the law of England was hampered," the present Law Member is evidently of opinion that the section is far from being a model of clear drafting. We are fully aware of the abilities as a draftsman of the Honorable Member to whom the credit of codifying the English law of Bills of Exchange is due. But, we hope, we shall not be suspected of any intention to disparage his abilities, if, in this particular matter, we prefer to follow the lead of that eminent jurist and judge who has been regarded, and justly regarded, in England, as the greatest authority in criminal law. Before considering the necessity for the proposed amendments and their character, scope and effect, it is necessary to take note of the law as it stands, and for this purpose we shall briefly pass in review the decisions that have been rendered by the different High Courts since the conviction of Mr. Tilak. The conclusion drawn from these cases by Mr. Chalmers is, that it is a criminal offence to stir

up feelings of contempt or hatred towards the Government, and that such conduct is none the less an offence, because resort to actual violence is not advocated. It has to be seen how far this conclusion is supported by the authorities relied upon by the Honorable Member.

Judges are not ordinarily in the habit of expressing their ideas with the precision or brevity of a statute. The principles which underlie judicial decisions are usually imbedded in a mass of circumstance, and the meaning of a judge has often to be tracked through a multitude of explanatory statements. A forcible illustration of our remark will be found in the judgments that have been delivered in the recent prosecutions for sedition. With reference to the interpretation of S. 124-A, the two points that really arise for consideration are, first, whether, and to what extent, the constitution, personnel, policy or motives of the Government are open to criticism, and, secondly, whether *any* feeling of dislike or ill-will against the Government would amount to disaffection, even if it was quite compatible with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority. So far as criticisms of the measures of Government are concerned, it is admitted on all hands that they would be protected by the explanation, so long as they were consistent with the disposition described above. But in reference to criticisms of the policy, the motives or the constitution of the Government, it has been said that they are not entitled to the same latitude as criticisms of measures, and that they would not be entitled to any protection, even though they were compatible with a disposition to obey and support the authority of the Government, if only they were likely to generate a feeling of ill-will against the Government. The question shortly put is this: Is criticism of the policy or motives or constitution of the Government obnoxious to the section, even though any ill-will or discontent produced by such criticism falls far short of a desire not to obey or support the authority of the Government? The different Courts before which this question has arisen have expressed themselves rather loosely and diffusely on the point, and, though it is possible to pick out passages here and there, tending to suggest a negative answer to the question, we do not think, it can be fairly said that that was the

intention of the learned Judges. Wherever the Judges have closely approached the point at issue, they have laid down the law in terms which confer immunity upon such criticisms to the same extent as upon criticisms of measures. That it is the right construction to be placed upon the section, and that it is the construction which accords with the letter and spirit of the English Law, we have shown at length in our article in the September number. Our remarks do not, of course, cover the exposition of the law by *Strachey*, J., at the trial of Mr. Tilak. That learned Judge has no doubt laid down unequivocally that the test afforded by the explanation to S. 124-A is applicable only to criticisms of measures, and would not save criticisms of other matters likely to cause even the mildest feeling of ill-will against the Government. It has been assumed in many quarters that *Mr. Justice Strachey's* view of the law has been followed by other Judges, and that it stands forth at this moment as a true and generally accepted exposition of the law. On the other hand, it seems to us that, while referring to *Mr. Justice Strachey's* opinion in terms of that courtesy with which judges are in the habit of treating each other's opinions, and which really means very little, the learned Judges in the subsequent cases have substantially, though not obtrusively, departed from his view and laid down the construction we have advocated. To a lay mind, it may be difficult to understand how a judge can be held to have departed from the view of a preceding Judge from whom he does not dissent, and, perhaps, even claims support for his position. But the process is a very familiar one to all lawyers, and it is well known that judges are anxious to appear not to have changed the law, even when they have changed it. An open difference with another judge is always distasteful to a Judge, and the necessity for the expression of any such difference is regarded as nothing less than a misfortune. We shall now show that far from following the law as laid down by *Strachey*, J., the Judges have in subsequent cases taken a very different view of the subject.

The application in the case of Mr. Tilak for leave to appeal to the Privy Council was heard by *Sir Charles Farran*, C. J., and *Candy* and *Strachey*, J.J., and the order of the Court dismissing the application was pronounced by the *Chief Justice*. The order is a very short one, and says that the contention of the defence that there must be a direct incitement to stir up disorder or rebel-

lion went too far, and that, though the definition of *disaffection* given by *Strachey*, J., was incorrect, it could not have misled the Jury. We may observe that we do not contend that, according to the language of the explanation, a writing is not seditious, unless it is an incitement to stir up disorder or rebellion. It is of course quite sufficient to bring a writing within the section, if it is incompatible with a disposition to render obedience to, and support the lawful authority of, the Government. We do not contend that an incitement to resort to actual violence is necessary to constitute an offence. No inference against our view can be drawn from the observations of the learned *Chief Justice.* Whether the charge of *Strachey*, J., could or could not as a whole have misled the Jury, was a matter upon which different minds might come to different conclusions, and it would not be safe to assume that the *Chief Justice* and *Mr. Justice Candy* intended to endorse every statement made by *Strachey*, J., merely because they thought the Jury could not have been misled by the charge as a whole. Nor, do we think, can it be fairly said that the Judicial Committee of the Privy Council intended to express their concurrence with *Strachey*, J., in the various propositions of law enunciated by him when they declined to admit the application of Mr. Tilak for special leave to appeal. Their Lordships are also careful to qualify their order by a reference to the charge as a whole. It must also be borne in mind that the admission of an appeal to the Privy Council in a criminal matter is subject to such severe restrictions that the interference of the Privy Council is extremely and, may we say, sometimes unfortunately, rare.

The appeal in the *Pratoda* case was heard by *Sir Charles Farran*, C. J., and *Parsons* and *Ranade*, J. J., and separate judgments were delivered by the learned Judges. 'Attempting to excite feelings of disaffection to the Government' is rendered by *Sir Charles Farran* into an attempt to produce political hatred of Government as established by law, to excite political discontent and *alienate the people from their allegiance.* Later on, the learned Judge said that the article as a whole had the object of making its readers *impatient of their allegiance* to a foreign sovereign and creating in them the desire of casting off their dependence upon England; in other words, of exciting feelings of disaffection to the Government established by law in British India. The test to be

gathered from these passages is whether the writing has a tendency to alienate the people from their allegiance. In another passage, the learned Judge points out that the publication of a libel exciting to disaffection against the Government itself—the constitution established by law—may be an offence, though the libel may insist upon the desirability or expediency of obeying and supporting the Government. If the learned Judge means that the libel would be an offence, even though it insisted upon the desirability of obeying and supporting the Government, if it was really the tendency or insidious aim of the libel to produce a contrary disposition we do not differ from him. But, if by no possible construction, the libel could be held to have a tendency to produce a spirit of disobedience or unwillingness to support the Government, we do not think it can fall within the section. The learned Judge draws a distinction between a man who is at heart loyal and who disapproves of the measures of Government and a man who is a rebel at heart, though ready to obey Government and support its lawful authority. It seems to us that the distinction of the learned Judge is metaphysical rather than practical and legal. The only kind of conduct which laws and courts can enforce is external conduct; and it would be idle and impracticable for a court to embark upon an enquiry into the workings of a man's mind, even though his conduct is that of a law-abiding citizen and has no tendency to make his fellow citizens less law-abiding. So long as the words used by a person do not lead or tend to lead his fellow subjects to disobey or refuse to support the Government, it would be a most futile task to attempt an examination of his psychological condition. The section and the explanation, as they stand, lay down only an objective test. It must not be supposed from the reference to disposition in the explanation that the test is other than objective. Mr. Chalmers points out in his speech that in England the law applies a purely objective test, and that the intention is presumed from the natural meaning of the words without reference to the actual feelings of the person who used them. In our opinion, the law in India is exactly the same. The feelings of the person who actually uses the words are immaterial, and the law has nothing to do with the question, whether the heart of a person is loyal or rebellious? In India, also, the effect of the words must be judged, not with

reference to the actual feelings of this individual or that individual who might have heard them, but with reference to the general tendency to impair the disposition to obey and support the Government. While the observations of *Sir Charles Farran* in this case cannot be said to be characterized by any great self-consistency, we think that, on the whole, his judgment is in support of our view. The judgment of *Mr. Justice Parsons* is the shortest, and perhaps the neatest exposition of the law. He holds that "the word *disaffection* used in the section under discussion, 124-A, cannot be construed as meaning an *absence* or the *contrary* of affection or love; that is to say, dislike or hatred, but must be taken to have been employed in its special sense as signifying political alienation or discontent; that is to say, a feeling of disloyalty to the Government or existing power, which tends to a disposition not to obey but to resist or subvert that Government or power. Used in this sense, it exactly corresponds to the closest, if not quite universally accepted use of its adjective, disaffected. To make or attempt to make a person disaffected, *i.e., to excite or attempt to excite in him a feeling of disloyalty to Government, or to create or attempt to create in his mind a disposition to disobey, to resist the authority of, or to subvert, the existing Government, is an offence under this section.*" The only qualification which we should be disposed to add to the statement of *Mr. Justice Parsons* is that, even if the feeling of disloyalty or discontent created by the writing is incompatible with a disposition to support the authority of the Government, the writing would fall within the purview of the section. *Mr. Justice Ranade* examines the English law at some length and defines *disaffection* as "a positive feeling of aversion, which is akin to disloyalty, a *defiant insubordination of authority*, or when it is not defiant, it secretly seeks to alienate the people *and weaken the bond of allegiance* and prepossess the mind of the people with avowed or secret animosity to Government—a feeling which tends to bring into hatred or contempt by imputing base or corrupt motives to it *and makes men indisposed to obey or support the laws of the realm, and which promotes discontent and public disorder.*" He thinks that the English have recognized greater freedom in the criticism of the acts or measures of Government and its officers than is permitted in attacks on the Government and the laws and constitution itself, and that it is this difference which

libels are treated as falling within the class of offences against the State, they must be punishable by reason of their tendency to disturb the foundations of Government. The only rational test, then, which should be adopted is the test furnished by the explanation to S. 124-A. It may perhaps be said that the creation of any feelings of dislike or ill-will against the Government, however mild in form or degree, is a source of danger to the State, and must be guarded against, while the creation of feelings of mere disapproval is attended by no such danger and requires no such penalties. The assumption that dislike or ill-will and disapproval are entirely distinct feelings, and that disapproval carries with it no implication of dislike is purely gratuitous. As happily pointed out by *Fitzgerald,* J., in *Regina* v. *Sullivan,* 11 Cox's Criminal Cases, p. 57 :—"The mere assertion of a grievance tends to create a *discontent,* which in a sense may be said to be seditious. But no jury if a real grievance were put forward and its redress *bonâ fide* sought, although the language used might be objected to—no jury would find that to be a seditious libel. It might be the province of the Press to call attention to the weakness or imbecility of the Government when it was done for a public good. How closely that trenches on the law of sedition ? And yet, such writing when *bonâ fide* would receive protection from a Jury." But the sort of discontent or ill-will, which is necessarily incidental to the ventilation of a grievance, is not of the class which is, or ought to be, guarded against. The question then in each case must, as we have stated, refer to the degree and good faith of the criticism in respect of motives and policy rather than to the mere *factum* of it. So far as the definition of *disaffection* itself goes, we think the definition given by *Mr. Justice Ranade* is in accord with our view.

The next case in which the question arose was the *Moda Vritta* trial, in which *Sir Charles Farran* was the presiding Judge. After referring to his judgment in the *Pratoda* appeal, his Lordship summarized his opinion by saying that anything having the direct tendency of producing discontent with the existing law and which tends to produce a desire to subvert the Government as now exists in British India and replace it with a Government of another kind was *disaffection.*

In the *Moradabad* sedition case, the meaning of the section was considered by a Full Bench of the Allahabad High Court, and

the decision of the Full Bench was pronounced by *Sir John Edge*, C.J. While we are not prepared to accept the discovery of the learned *Chief Justice* of a complete harmony between the opinions of *Strachey*, J., and those of the other learned Judges in the subsequent cases, we do not think that on the whole his Lordship intends to lay down a different view of disaffection from that understood by us. His Lordship observes, "in our opinion anyone who by any of the means referred to in S. 124-A of the Indian Penal Code excites or attempts to excite feelings of hatred, enmity or hostility towards the Government established by law in British India, excites or attempts to excite, as the case may be, feelings of disaffection, as that term is used in S. 124-A, no matter how guardedly he may attempt to conceal his real object. *It is obvious that feelings of hatred, dislike, ill-will, enmity or hostility towards the Government must be inconsistent and incompatible with a disposition to render obedience to the lawful authority of the Government and to support that lawful authority against unlawful attempts to subvert or resist it.*"

It seems to us on a review of these authorities that the conclusion fairly deducible from them is that the discontent, the creation of which is struck at by the section, is that discontent which is incompatible with a disposition to obey and support the Government; and that the conclusion is in harmony with the letter and spirit of the English law. Let us now see how far the claim put forward on behalf of the new amendment by the Honorable Mr. Chalmers that it embodies the result of the recent decisions in a clearer form than the existing section, is well founded. We have also to examine how far the amendment can be regarded as a closer approach to, and adoption of, the provisions of the English law.

The amendment now proposed repeals the present section 124-A, and substitutes a new section for it.

The present section.	*The new section.*
Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for	"Whoever by words either spoken or written, or by signs or by visible representation or otherwise, *brings or attempts to bring into hatred or contempt*, or excites or attempts to excite disaffection towards *Her Majesty* or the *Government, or promotes or attempts to*

The present section—contd.

life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Explanation. Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation is not an offence within this clause.

The new section—contd.

promote feelings of enmity or ill-will between different classes of Her Majesty's subjects shall be punished with transportation for life or any shorter term to which fine may be added, or with imprisonment which may extend to *ten* years, to which fine may be added, or with fine."

"*Explanation 1:—The expression 'disaffection' includes disloyalty and all feelings of enmity or ill-will.*"

"*Explanation 2:—Comments on the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence.*"

The portions we have italicised represent the modifications introduced in the law by the amendment. One of the most important alterations made by the amendment is in regard to the definition of *disaffection* and to the inclusion within the section of certain other species of libels specifically. According to the explanation, *disaffection* includes disloyalty and all feelings of enmity or ill-will. The object of the explanation apparently is to make the creation of any feeling of ill-will, however mild, liable to punishment, irrespective of all questions of degree. The description now given of the term *disaffection* may be in accordance with the exposition of the law by *Strachey*, J., but it is neither scientific, nor in accordance with the result of the recent decisions in India which we have examined at some length. The real effect of these decisions is, as we have shown, to make the section strike only at those forms of discontent, which tend to shake the allegiance of the subject and make him indisposed to obey or support the Government and not to strike at that other form of discontent, which seeks to make known existing defects and secure remedies and which may be regarded as a wholesome incentive to interest in public affairs,

and as one of the necessary springs of improvement, political or social. The second explanation appears to us to be a totally superfluous and ridiculous piece of draftsmanship. The object of an explanation must be to explain something about which there might otherwise be some doubt or obscurity, and not to repeat what is already sufficiently clear without it. The explanation to the existing section is scientific, because it makes clear something which is not sufficiently made clear by the main section, namely, the degree of disaffection required to constitute the offence. Explanation 2 of the amendment, on the other hand, throws no additional light upon the meaning of the section, and is not required to protect any writing which might not be protected without it. According to this explanation, comments on the measures of Government, even if made with a view to obtain their alteration by lawful means, do not constitute an offence, *only* if they do not excite or attempt to excite hatred, contempt or disaffection. If a writing does not excite or attempt to excite hatred, contempt or disaffection, it cannot possibly fall within the section, and it requires no explanation to tell us this. According to this explanation, even if a person comments on a measure of Government *bonâ fide*, with the object of obtaining its alteration by lawful methods, he will be guilty of an offence, if incidentally or unavoidably he happens to cause any ill-will or discontent. This is certainly not the Indian law. But it is alleged to represent the English law; and we are sorry to find that this claim has been accepted without question both in the press and on the platform in this country. On the other hand, it appears to us that there is a serious departure even from the letter of the English law on the subject, and we must confess to considerable surprise at the statement that the amended section brings the law upon this point more clearly into accord with the English law. Before we quote the provision of the English law upon the subject, we may be allowed to observe that the actual English law now administered in regard to sedition cannot be gathered from the letter of the law alone, but depends very largely upon the spirit in which it is interpreted and administered and upon the machinery for its administration. The Honourable Mr. Chalmers quotes the definition of seditious intention from Stephen's Digest of the Criminal Law, Ed. 5, Art. 98. He, however, omits to quote the 2nd paragraph

of that article. While the first paragraph points out what is a seditious intention, the second paragraph points out what is not a seditious intention. The second paragraph runs as follows:—"An intention that Her Majesty has been misled or mistaken in Her measures, *or to point out errors or defects in the Government or Constitution as by law established* with a view to their reformation, or to excite Her Majesty's subjects to attempt, by lawful means, the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred or ill-will between classes of Her Majesty's subjects is not a seditious intention." It will be observed from this explanation that a person who writes without any seditious intention, as explained in this paragraph, cannot possibly be guilty of an offence, merely because the writing may incidentally produce some discontent; and this is exactly how the English law was understood by that eminent Judge *Sir James Stephen*. In moving the adoption of the present section 124-A, *Sir James Stephen* explained that to punish the doing of an act which one knew to be likely to produce disaffection might be to punish a man for doing an act which he had a right to do although it produced disaffection. He could imagine many things which a public man might have a right to do even at the expense of exciting disaffection, but which nevertheless should not be punishable. Though a person is deemed to intend the natural consequences of his conduct at the time, and under the circumstances of his conduct, there is a well-known distinction both in the English law and in the Indian law between intending a result and knowing it to be likely that a result will be caused. Notwithstanding the knowledge that a person may have that a particular consequence may ensue, he is in many cases said not to intend that result. To draw an illustration from the Penal Code, we may refer to the definition of culpable homicide in S. 299. "Whoever causes death by doing an act with the *intention* of causing death or with the intention of causing such bodily injury as is likely to cause death, or *with the knowledge that he is likely by such* act to cause death, commits the offence of culpable homicide"; and the fourth clause of S. 300 provides that "if the person committing the act knows that it is so imminently dangerous that it must *in all probability cause death*, or such bodily injury as is likely to cause death and commits such

act without any excuse for incurring the risk of causing death or such injury as aforesaid;" culpable homicide is murder. It is obvious that intending a result is treated as something distinct from a mere knowledge of the likelihood of the result; and as regards culpability, there is a difference between doing the act with the knowledge that death is the most probable result and doing the act with the knowledge that death may result. Similarly, though a certain amount of discontent may naturally follow the publication of a writing, still if the primary result which is or ought to be contemplated is not the discontent, but the remedying of some defect, the writing should not be held to be seditious.

Again, while the present section uses the words *Government established by law in British India*, the words *established by law in British India*, are omitted in the amendment. The words used in the definition of seditious intention by *Sir James Stephen* are "*the Government and constitution* of the British Kingdom as by law established". We do not see any reason for the alteration of the language of the present section in this respect. The language, as it stands, is identical in import with the language in English law. But according to the amended section the interpretation of the term *Government* would give rise to doubt and difficulty. S. 17 of the Penal Code defines *Government* as "the person or persons authorized by law to administer executive government in a presidency." It may be suggested that a writing which reflects upon the character of a member of the Executive Council of the Government of India would fall not merely within the ordinary law of defamation, but also within this special category of offences against the State and amount to sedition. Suppose a member of the Executive Council purchases lands *benami* in the name of his wife, contrary to the regulations of the Civil Service and makes a false return to the Government or is guilty of some other misconduct, the exposure of which would be in the interests of the public, but would as certainly tend to bring him into contempt. The fact that the imputation is true might by itself afford no defence. Is it reasonable that writings of this kind should be dealt with under the specially stringent law of sedition? Again if a member of the Executive Council introduces an imprudent or clumsy measure, criticism of it will naturally have the effect of bringing the author into some degree of

contempt, but it would be intolerable that such criticisms should be prohibited, merely because they produce contempt.

Again, the provision in the amended section in reference to promoting or attempting to promote feelings of enmity or ill-will, between different classes of Her Majesty's subjects is said to be adopted from the English law. But the provision is one of a dangerously vague character and has been found difficult to work even in England. In *Regina* v. *Burns*, 16 Cox's Criminal Cases, 355, the matter was considered by *Mr. Justice Cave*, who made the following observations in his charge to the jury. "Now the seditious intentions which it is alleged existed in the minds of the prisoners in this case, are: first, an intention to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of some matter in Church or State as by law established; and secondly, to promote feelings of hostility between different classes of Her Majesty's subjects. This is necessarily somewhat vague and general, particularly the second portion, which says it is a seditious intention to intend to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects. I should rather prefer to say, that the intention to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention according to circumstances, and of those circumstances the jury are the judges; and I put this question to the Attorney General in the course of the case: "Suppose a man were to write a letter to the papers attacking bakers and butchers generally with reference to the high prices of bread and meat, and imputing to them that they were in a conspiracy to keep up high prices, would that be a seditious libel, being written and not spoken?" To which the Attorney General gave me the only answer which it was clearly possible to give under the circumstances, "That must depend upon the circumstances." I, sitting here as a judge, cannot go nearer than that. Any intention to excite ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention; whether in a particular case this is a seditious intention or not, the jury must judge and decide in their own minds, taking into consideration the whole of the circumstances of the case. You may not unnaturally say that this is a somewhat vague statement of the law, and ask by what principle shall we be governed in deciding when an intention to excite

ill-will and hostility is seditious, and when it is not. For your guidance, I will read to you what was said by *Fitzgerald*, J., in the case of *R.* v. *Sullivan*, 11 Cox. C. C. 44." Here his Lordship after reading an extract from the judgment of *Fitzgerald*, J., observed :—"Now, that language was used, as I have said, in reference to a seditious libel, but changing the language so as to apply it to a speech, the principles laid down are clearly applicable to the case which you have now got before you. And,—although as a judge I can tell you no more than that the intention to incite ill-will amongst the different classes of Her Majesty's subjects may be seditious, and that it is for you to decide,—I confess, I should, if I were sitting amongst you as a juryman, go on to say something of this kind which you would or would not listen to, according as you found it to be quite in reason. It is not a matter of law which you are bound to take from me, but it is merely a matter which you would say to each other; if you think that these defendants, from the whole matter laid before you, had a seditious intention to *incite the people to violence, to create public disturbances and disorder*, then, undoubtedly, you ought to find them guilty. If from any sinister motive, as, for instance, notoriety, or for the purpose of personal gain, they desired to *bring the people into conflict with the authorities, or to incite them tumultously and disorderly to damage the property of any unoffending citizen*, you ought undoubtedly to find them guilty. On the other hand, if you come to the conclusion that they were actuated by an honest desire to alleviate the misery of the unemployed,——if they had a real *bonâ fide* desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment".

Though the excitement of ill-will, between different classes of Her Majesty's subjects is said to amount to disaffection, we see that in practice this provision of law is applied only in cases in which there is an incitement to violence. Where a person incites any class of people to use violence towards the members of any other class and thus stirs public disorder, his conduct is certainly criminal and ought to be punishable. Whether the case is one which may be dealt with under the head of offences against the public tranquillity or under the head of offences against the State may be a question for consideration. It may be that the incitement to

violence may be of such a serious character that it ought to be dealt with under the classes of offences against the State. But if a person were to write a historical account of the habits and customs of a particular class of the community which might have the effect of subjecting the members of that class to odium or ill-will, or if a member of a religious sect were to enter into a theological controversy which might have the effect of raising angry feelings on both sides, it would be unreasonable to hold such persons guilty of the offence of sedition, so long as they did not, and had no reason to, anticipate any violence as the natural and probable outcome of their utterances. The necessity for the introduction of this portion of the amendment does not also appear to us to be sufficiently demonstrated. If we object to this provision, it is not because we approve of the promotion of ill-will between different classes, but because it may stand in the way of much innocent and lawful expression of thoughts and opinions on account of their incidentally producing ill-feeling between members of different classes.

The amendment proposed to be introduced does not thus really represent the letter of the English law. But if we consider the spirit of the English law and the method in which it is administered, we shall find that the difference between the amendment and the English law is much wider. Whatever may be the apparent rigour of the English law of sedition, there can be no doubt that it is interpreted by judges and juries in a manner most favorable to the liberty of the Press; and the Government in England does not undertake any prosecution for seditious libels except when there has been an incitement to violence. If the law were strictly administered, nearly all the leading politicians in the Opposition would, as pointed out by Mr. Labouchere, have to be arraigned for sedition. To take, for instance, the recent discussion in England on the conduct of Her Majesty's Government in regard to the Chitral affair, the leading members of the Opposition have made the most severe strictures upon the Government and charged it with gross breach of faith. There can be little doubt that such language is calculated, and intended in the most direct manner possible, to bring the Government into contempt, if not to drive them out of office. But no cabinet with any pretensions to sanity of judgment would think of directing a prosecution for seditious libel in respect of such utterances. To use the language of *Mr. Justice Cave* in *Regina* v. *Burns*,

the moral justification for a prosecution by the Government is that disturbances have actually and naturally followed the utterances. The fact that the criminal law in England is administered by judges who are trained lawyers and with the help of juries who are imbued with respect for the liberty of the Press is another circumstance which tends largely to temper the administration of the law. In India, on the other hand, except in the Presidency towns judges are the arbiters of both law and fact, but do not possess the same training and qualifications that are possessed by their English brethren. It is truer now than ever that with a small number of distinguished exceptions, judges and magistrates are not conspicuous for their legal learning or legal instincts. We need not go further for our authority on this point than to the speech of Sir Henry Prinsep in connection with the Criminal Procedure Code Amendment Bill where he refers to the want of legal experience of magistrates, It has also to be borne in mind that owing to the peculiar circumstances of the country, judges are often liable to be prejudiced, and not likely to take dispassionate views of cases. This is more likely to be the case in times of excitement when race or class feelings are likely to be aroused. The ridiculous severity of the sentence inflicted by the Sessions Judge in the *Pratoda* case argues either a considerable amount of prejudice or a serious want of judicial training and temperament, defects that are unfortunately not rare among our judges and magistrates. The conduct of the Magistrate who ordered Joglekar to furnish security for good behaviour and remanded him to jail for periods far in excess of the limits allowed by law, furnishes another instance.

From the foregoing discussion, it will be evident that the amendment now proposed of section 124-A of the Indian Penal Code cannot be regarded as substantially representing the letter, or embodying the spirit, of the English law on the subject. We have also shown that the statement that there is no departure from the law now in force in India is equally unfounded whether regard is had to the declarations of Sir James Stephen at the time he moved for the introduction of the present section or to the opinions of judges in recent cases. It is clear that there is a variance between the law now in force and the law newly proposed. We have no objection either to the re-enactment of the existing law in clearer terms or to the substantial adoption of the English law upon the point. But

we have the strongest objection to the introduction of a law which is neither the law of England, nor the law of India, but a fantastic hybrid for which no justification can be found in either the peculiarities of this country or the exigencies of the times. It seems to us that the policy underlying the new amendment is inconsistent with true statesmanship. If there are any grievances regarding the administration of the Government, if there are any defects in the constitution of the Government, if there are any blunders in the policy of the Government, which cause or are likely to cause discontent among the people, it would be the part of wisdom to permit the fullest facilities for the discussion of such grievances, defects or blunders, for the suggestion of measures of redress, reform, or remedy, and consider such discussions or suggestions in a spirit of conciliation and sympathy. It appears to us to be an unfortunate attitude for an enlightened Government to take, that it should not permit its subjects to talk freely of matters which are a source of irritation to the people, simply because it may have the incidental effect of inducing a sympathetic discontent. If there are any sources of discontent in the land, they must be removed by abolishing the causes of irritation and not by a legislative fiat. The Legislature seems to imagine that if it says 'let there be no discontent in the land,' discontent must cease to exist. We must confess we have not the same faith in the legislative cure of disaffection that is now proposed. We disapprove of the stringency of the proposed amendments, not because we have any sympathy with seditious writings, but because the question of what is fair and unfair criticism is a very delicate and a difficult one, and criticisms which are perfectly fair may be considered by persons who are the subjects of criticism or who are members of the service or class against which the criticism has been levelled, to have exceeded the bounds of fairness. The terrors of the law of sedition are likely to have the effect of stifling the expression of even genuine grievances, and producing a sycophantish press and giving rise to an undercurrent of discontent that may be more dangerous to the State than the open expression of it.

To summarize our suggestions with reference to the new section 124-A: (1) the word *disaffection* should be replaced by some word or words capable of conveying a clearer and more precise meaning; (2) it should be made clear that the word *Government* does not

refer to or include any individuals who may, for the time being, happen to have a share, large or small, in the executive administration of the country; (3) the clause relating to the promotion of ill-will or enmity between different classes of Her Majesty's subjects should be altogether expunged from the section; and (4) it should be made clear that comment on the measures, motives, policy or constitution of the Government, if made with the object of securing reforms in any matter or the redress of grievances does not fall within the scope of the section, even though such comment may incidentally produce some discontent.

If the section were re-cast in some form like the following, it would obviate the objections to which the amendment proposed by the Government is open, and the accord between the section and the English law would be a reality and not a mere delusion:—

"Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise brings or attempts to bring Her Majesty into hatred or contempt, or excites or attempts to excite feelings of disloyalty towards Her Majesty, or excites or attempts to excite, against the constitution of the British Indian Government established by law, feelings of disloyalty tending to create a disposition not to obey the lawful authority of the Government, or support such authority against unlawful attempts to subvert or resist it, or a disposition to subvert or resist the Government, or excites or attempts to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in State by law established, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to ten years, to which fine may be added, or with fine.

Explanation.—Writings or utterances intended to shew that Her Majesty has been misled or mistaken in her measures or policy, or to point our errors or defects in the administration or constitution of the British Indian Government as by law established with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in State by law established, do not fall within this section."

The proposal to amend column 8 of schedule II in the Criminal Procedure Code in the entry relating to Section 124-A, by inserting the words "Presidency Magistrate or Magistrate of the first class" after the words "Court of Session" appears to us to

be altogether uncalled for and dangerous. It is said that in many cases the machinery of an elaborate State trial would be out of place and the guilt or the position of the offender might be such as to call only for a light punishment. So long as the gist of the offence is an attack against the existence or stability of the State, and so long as the previous sanction of the Government is required for a prosecution, the trial will be a State trial in whatever *forum* it may be held. One important object of the administration of justice in any civilized country must be to induce in the minds of the people a feeling of confidence in the ability and impartiality with which justice is administered. This feeling is likely to be greatly weakened by the investiture of Magistrates of the first class or Presidency Magistrates with powers to try cases of sedition which, from their very nature, are sure to attract a large amount of public attention and interest. The powers of the superior courts to interfere on appeal or in revision are, from painful experience, not looked upon by the public as an adequate safeguard against improper convictions. Under the existing law, in convictions by the Sessions Courts in the mofussil, the accused has a right of appeal to the High Court, and in prosecutions in the Presidency Towns, the accused has the privilege of a trial by jury. The removal of these safeguards must necessarily give rise to a feeling of insecurity in the administration of justice. That this amendment will, in the matter of jurisdiction, bring S. 124-A into line with sections 326, 372, 392 and other sections is no argument at all, for the simple reason, that there is no analogy between offences primarily aiming at the State and offences primarily aiming at individuals.

The next proposal that has to be noticed is the provision for enforcing security for good behaviour which is proposed to be inserted after S. 108 of the Criminal Procedure Code. The proposed amendment is in these terms :—

"Whenever a Presidency or District Magistrate or a Magistrate of the first class specially empowered by the Local Government in this behalf has information that there is within the limits of his jurisdiction any person who either orally or in writing disseminates or attempts to disseminate or in any way abets the dissemination of any obscene, seditious or defamatory matter, such magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding twelve months as the Magistrate thinks fit to fix."

The provision is an extraordinary one and without any justification. The reasons assigned for this amendment are that a person who disseminates such matter must be regarded as a public nuisance and that he must be prevented from doing mischief by an effective warning of this kind and that it would be absurd to deal with him by an elaborate State prosecution. This provision is likely to have the effect of practically placing the Press under censorship, and giving the Government that control which they disclaim all desire of exercising. Whatever propriety there may be in guarding against the dissemination of obscene matter, we do not think that this power of warning, as it is called, should be exercised in the case of seditious or defamatory matter. It seems to us there is absolutely no reason or precedent for providing for any security in regard to the circulation of defamatory matter. A person who is aggrieved by a defamatory publication may well be left to his remedies in the civil and criminal courts to protect his reputation. Defamation is essentially a private grievance. The offence is not cognizable except upon the complaint of the person aggrieved and is allowed by law to be compounded by him. Cases of defamation very often raise intricate questions of privilege and it would be unjust that such matters should be disposed of summarily by the magistrate. As the amendment stands, a person who is alleged to have slandered another in a small circle of friends may be at once called upon to furnish security for his good behaviour. With regard to seditious matter again, it seems to be a most dangerous power to put into the hands of magistrates to enable them to call upon any person whose writings are in their opinion seditious, to furnish security. There is no analogy between the case of a breach of the peace and the case of seditious, obscene or defamatory matter. Imminent breach of the peace is a good reason for interference by preventive action under section 108 by calling for security for good behaviour. But where no breach of the peace is imminent, no harm would be done to public interests by the delay of a trial, and it would be dangerous to entrust such summary powers to magistrates. It is said that elaborate State prosecutions are unsuited to such offences. We do not see what special difficulty there is likely to be in such prosecutions any more than in others. With the exception of the fact that the sanction of the Government may have to be obtained first, prosecutions for sedition would be State prosecutions neither

more nor less than prosecutions for other offences. The absence of any right of appeal against orders by Presidency or District Magistrates to furnish security for good behaviour will convert the section into an engine of terrorism. The exercise of powers of revision by the High Court is mostly a farce and furnishes no remedy, as the High Courts are, according to their unwritten law, reluctant to interfere except in the event of some flagrant error of jurisdiction or law.

The next amendment proposed by Government that we have to consider is the amendment of S. 505 of the Indian Penal Code. For convenience of comparison we subjoin the present section and the proposed amendment side by side.

The present section.

"Whoever circulates or publishes any statement, rumour or report which he knows to be false, with intent to cause any officer, soldier or sailor, in the Army or Navy of the Queen, to mutiny, or with intent to cause fear or alarm to the public, and thereby to induce any person to commit an offence against the State or against the public tranquillity, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The proposed section.

"Whoever *makes*, publishes or circulates any statement rumour or report,—

(*a*) with intent to cause, or *which is likely to cause*, any officer, soldier or sailor in the Army or Navy of Her Majesty or *in the Royal Indian Marine or in the Imperial Service troops*, to mutiny, *or otherwise disregard or fail in his duty as such*; or

(*b*) with intent to cause, *or which is likely to cause, fear or alarm* to the public, *or to any section of the public whereby they may be induced* to commit an offence against the State or against the public tranquillity; or

(*c*) *with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community*, shall be punished with imprisonment of either description which may extend to two years, or with fine or both,

The proposed section.—contd.

Exception.—It does not amount to an offence, within the meaning of this section, to make, publish or circulate any such statement, rumour or report, as aforesaid, when such statement, rumour or report is true, and is made, published or circulated without such intent as aforesaid."

The principal modifications in the law introduced by the amendment are altogether of an unprecedented character. We are not aware that any instances have occurred in recent years to call for such a provision. Nor are we aware of any similar provision of law in England. The only description of offence of a similar kind that we have been able to find in the English books is that known as spreading false news to make discord between the sovereign and nobility or concerning any great man of the realm, which is said to be a misdemeanour punishable by common law with fine and imprisonment. See IV, Stephen's Commentaries, 10th Edn., p. 224. We have not been able to discover any case of a prosecution in England for an offence of this kind within the last hundred years. The provision may be regarded as practically obsolete in England. The best remedy for any mischief likely to be caused by the spreading of false news is the freedom of the Press which, in these days of rapid communication between different parts of the world, may be trusted to publish a contradiction of the false news, immediately after its publication. If the liberty of the Press carries any bane with it, it carries the antidote also, and the evils apprehended from the liberty of the Press are sure to be corrected by the same means. The prohibition of the publication of news which is true on the ground that it may cause alarm to the public appears to us to be a retrograde measure. Mr. Chalmers states that it has been urged upon the Government that the publication of statements likely to cause people to commit offences against the law or cause fear or alarm to the public, ought to be punished irrespective of the truth or falsehood of the statement and without reference to the *bonâ fides* of the person's intentions. We do not know who is responsible for this recommendation to the Government. But, we do not think the Government has acted wisely in acting upon this

advice to any extent. The most extraordinary feature about the amendment is that it throws upon the accused the burden of proving that he published the statement or rumour without any such intention as is described in the section. The protection conferred by the exception is altogether illusory, since it will be presumed that the accused must have intended the ordinary and natural consequences of his acts; and the burden of proof thrown upon the accused is one which he will ordinarily be unable to discharge. It seems to us also that a Government which is afraid of the publication of true news is likely to sink in the estimation of its subjects.

The course of extraordinary legislation upon which the Government has now embarked has created a general feeling of uneasiness and insecurity in the minds of the people. The fear is generally entertained that the liberties of the people are likely to be at the mercy of magistrates who are armed with new powers and who may not always be able or willing to discriminate between persons who have overstepped the bounds of fair criticism and persons who have kept within those limits. If anything is calculated to produce an *absence of affection* towards the Government in the minds of the people, it is not the occasional virulence of the native Press too often provoked by the acrimony of the Anglo-Indian Press or the want of sympathy of local officials, but measures of legislation of a retrograde character like the amendments that have now been proposed.

THE INDIAN STAMP BILL.

We think the Indian Stamp Bill now before the Supreme Legislature is a considerable improvement upon the existing law. The speech of Sir James Westland introducing the bill fully explains the improvements and other changes effected. We have no mind to dwell upon the measure in detail, but we would draw special attention to a few of the more important changes proposed to be effected by the new legislation and make a few suggestions calculated to improve the measure.

There is one important point to which the attention of the Legislature does not appear to have been drawn. It is a well recognized rule, that where an instrument is lost, the presumption

is that it was duly stamped. Taylor in his work on Evidence says "Where secondary evidence is tendered to prove the contents of an instrument which is either lost or retained by the opposite party after notice to produce it, the court will presume that the original was duly stamped unless some evidence to the contrary be given." See *Hart* v. *Hart*, I Hare 1, *Crowther* v. *Solomons*, 6 C. B., 758, *Pooley* v. *Goodwin*, 4 A & E, 94; *R.* v. *Long Buckby*; 7, East, 45; and *Clos-Madeuc* v. *Carrel*, 18 C. B., 36. But where that presumption is rebutted, no secondary evidence is held receivable of the contents of the document lost or retained by the opposite party. See *Sennandan* v. *Kollakiran*, I. L. R., 2 M., 208, and *Kopasan* v. *Shamu*, I. L. R., 7 M., 440. The same rule of excluding secondary evidence has been laid down in England; see *Marine Investment Company* v. *Haviside*, L. R., 5 English and Irish Appeals, p. 624. Lord Cairns, however, remarked in the last case at p. 634, "it is always in some sense a disagreeable and sometimes an invidious thing to hold that a case should fail for want of a stamp being affixed on an instrument; and there are cases in which such a result arising from accident must be regarded with painful regret." One may add that instances often occur of a deficient stamp being affixed owing to doubt in the interpretation of the law as regards the proper duty or the class of instrument under which the particular document falls, and if in such cases the instrument happens to be lost or retained by the opposite party, it becomes a matter of deep regret that no evidence can be received of the liability evidenced by the instrument. We have not been able to understand the principle upon which this hard rule is based; and we doubt whether such a result could have been intended by the Legislature. We would, therefore, suggest that in the case of lost instruments or instruments retained by the opposite party which are found to be not duly stamped, a provision should be enacted that secondary evidence may be received on the payment of the deficient stamp duty and the penalty.

Another point of importance is the rule that in the case of bills of exchange and promissory notes and documents liable to be stamped with one anna, they shall not be received in evidence, if they have not been duly stamped. This rule has been somewhat relaxed by the new clause added to S. 35, that "where an unstamped receipt has been given, it shall be admitted in evidence on

payment of a penalty of one rupee." We would by the way remark that this relaxation should not be confined to the mere case of the person giving the receipt bringing a suit, but should also apply where he pleads a set-off and to other cases where such receipt may be tendered in evidence. The definitions of "promissory note" and "bill of exchange" have been enlarged so as to cover instruments not till now falling within the scope of those terms. We are aware that promissory notes and bills of exchange not properly stamped are not receivable in evidence even under the English law. See *Green* v. *Davies*, 4 B. & C., 235, and *Ashling* v. *Boon* 1891, I. Ch., 568.

In the recent English Stamp Act of 1891, 54 & 55 Vic., Ch. 39, it is enacted by Ss. 37 and 14, that a bill of exchange or promissory note shall not be given in evidence or be available for any purpose whatever. We fail to see sufficient reason for the exceptional treatment of promissory notes and bills of exchange in this respect. Moreover, having regard to the difficulties at times of determining whether an instrument is a promissory note and to the demoralization sometimes caused in parties seeking to invent a previous consideration to make that the basis of a suit, we would suggest the advisability of such instruments as promissory notes and bills of exchange being made receivable in evidence, at least where they evidence non-mercantile transactions. There may be some reason why the Legislature should compel the proper stamping of such instruments in mercantile transactions at the risk of not being receivable in evidence, if not duly stamped. There is one important relaxation introduced by the Legislature in cases where a stamp of a different denomination is affixed by mistake, though of a sufficient amount; See. S. 37 of the Bill. It seems to us to be only in consonance with the rule regarding receipts and the rule last referred to, that the Legislature should deal with promissory notes and bills of exchange insufficiently stamped in the same liberal spirit.

We would also draw attention to S. 26 of the Act which appears to us to require some modification. A proviso no doubt is introduced in the case of a lease of a mine subject to certain limitations, but the section appears to us to work hardly in other cases. In the case of all leases for any considerable period where

there is a grain rent, it will be impossible having regard to the fluctuation in prices to determine beforehand the exact value upon which the stamp is payable. If the stamp happens to be paid upon the value as calculated at the current rate on the date of the instrument, it is hard to condemn the lessor to the loss of the profit arising from the rise in prices. The section rests upon the principle that the disposition of the party to value instruments at the lowest possible figure should be curbed by the risk of his losing any amount in excess of that which is covered by the stamp. But, to apply this to cases where there could be no dishonesty or intention to evade the stamp is an unjust extension of the principle. We would, therefore, suggest that instruments which require repayment in kind on a future date should not be brought within the operation of S. 26, whatever penalty may be provided for the deficient stamp duty, (See *Adarji Dorabji* v. *Rajaram Jhurakhanlal*, F. B. Bombay Printed Judgments, 1897, p. 382.)

The provisions in the new bill relating to refund and remission of stamps and penalties in Ss. 45, 49 and 51 are specially commendable. But we think the provision of various periods of time within which the application for relief should be made is to be deprecated. We would suggest a uniform period in all cases. We do not approve of the addition made to S. 75, that the Governor-General in Council may make rules prescribing the penalties to be incurred on breach of the rules made by him without any limitation as to the nature of such penalties.

As regards the duties fixed by the Act and the extension of certain definitions so as to render certain documents liable to duty, we have a few remarks to make. We do not think it right that the definition of an instrument of partition should be extended so as to cover a final order for effecting a partition passed by any civil court. This provision appears to have been enacted in the supposed view that people evade the stamp duty payable upon a partition deed by resorting to the civil courts for a decree for partition. Suits for partition are certainly not instituted with that object. And although in suits for partition where the plaintiff is in joint possession, a nominal stamp duty may alone be payable under S. 7, sub-section 4, in suits where he is excluded from possession which form by far the large majority of partition suits, court-fee is payable upon the value of the share claimed. We would, therefore, deprecate the com-

pulsory payment of an additional duty upon the decree for partition. If it is intended to make any provision with reference to the case where the plaintiff in joint possession in a partition suit escapes with a light fee, he may be made to pay the full court-fee as in cases where he is out of possession.

We are unable to approve of the principle of illustration 2 to S. 24 which requires, in cases where the mere equity of redemption is sold to a stranger, the payment of stamp upon the value of the whole property including the mortgage amount. We think, this is an addition, not altogether justifiable, to the law as it stands at present, or as it is laid down in S. 57 of the English Stamp Act of 1891. We do not think that cl. i of Art. 1 of Sch. I is well conceived. An acknowledgment should not be required to be stamped merely because it happens to be attested. Many such acknowledgments may be of value as evidence especially where the person making the acknowledgment happens to be a marksman, but it seems to us hard to make each such acknowledgment liable to duty as a bond. We would like the words "instrument recording an adoption" in Art. 3 to be made clearer so as to apply only to what is known generally as an adoption deed, and not so as to cover cases of letters or other documents merely reciting the adoption.

A somewhat drastic change is effected by Art. 49 relating to promissory notes payable on demand. Such instruments are made liable to *ad valorem* stamp duty like bills of exchange payable otherwise than on demand, but not more than one year after date. People are becoming very familiar with this class of instruments; and the change appears to us to be dictated by a desire to make more revenue. We are of opinion that there is considerable danger, for some time to come, of large transactions evidenced by such instruments becoming incapable of proof, because of the unfamiliarity of the public with this new scale of duties and the rigid provision of the law that such instruments cannot be received in evidence upon payment of the deficient stamp duty and penalty. The provision will moreover hamper mercantile men in their transactions.

NOTES OF INDIAN CASES.

Venkatramayya v. Krishnayya, I.L.R., 20 M., 319. We regret the decision in this case, though there is a good deal to be said in support of it. As regards the question of limitation, prior to the amending Act of 1892, there could be no distinction between an insufficiently stamped plaint and an insufficiently stamped memorandum of appeal. With regard to the latter, the High Court of Madras held in two cases, *Chennappa* v. *Raghunatha,* I.L.R., 15 M., 29, and *Patcha* v. *Sub-Collector of North Arcot, Ib.* 15 M., 78, dissenting from *Balkaran* v. *Gobind,* I.L.R., 12 A., 129, that the payment of the deficient stamp within the time fixed though after the period of limitation calculated up to the date of payment, would render the original presentation valid for purposes of limitation. This view has also been followed by the High Court of Calcutta: *Moti* v. *Chhatri Das,* I.L.R., 19 C., 780, and *Huri Mohun* v. *Naimuddin, Ib.* 20 C., 41. Though this view of the Madras Court has been modified by the Legislature with regard to appeals and applications for review of judgment to the extent that the presentation is to be considered proper only where the deficiency arose from mistake, the Legislature has not chosen to modify it with regard to plaints. The learned Judges who decided this case, *Shephard* and *Davies,* J. J., make no reference to the earlier Madras cases and seem to approve of the decision of the Allahabad Court. See our note in 3 M. L. J., p. 31. The question, we think, must now be considered by a Full Bench.

Balkishen Das v. W. F. Legge, I.L.R., 19 A., 434. In this case, the question was whether the transaction was a sale with a right to repurchase or a mortgage by conditional sale. It is really a question of difficulty in the particular circumstances of each case, and this has rather been enhanced by the decisions of the courts which have really failed to supply the real tests for arriving at a solution of the question. In the case under notice, we have no doubt that it was a mortgage by conditional sale as was decided by the learned Judges. The line of demarcation is so thin that it is well to abolish the distinction altogether. In a recent case which came before the High Court of Madras in which all the elements for determining that it was a mortgage seemed to be present, the Court held that it was not. *Venkata Krishna Rao* v. *Venkatachalam,* 7 M. L. J. Rep. 299.

Bhujbal v. Nanheju, I.L.R., 19 A., 450. A suit for rent in respect of lands situated outside British India was held to lie in a court within British India in whose jurisdiction the defendant resided. In *British*

South Africa Company v. *Companhia De Mocambique*, 1893 A. C. 602, it was held by the House of Lords reversing the decision of the Court of Appeal that an action for damages for trespass to land situated abroad did not lie in England. We find no reference to this case in the judgment of the Allahabad Judges though it would seem to have a material bearing.

Brij Nath De *v.* Chander Mohan Banerji. I. L. R., 19 A., 458 *Edge*, C. J., and *Blair*, J., rightly hold in this case that in an application for probate, the Court has no business to enquire if the property dealt with in the will was the property of the testator. Such an enquiry would open up a large field and has no connection with the genuineness of the will or the testamentary capacity of the testator.

Fakire *v.* Tasadduq Husain, I. L. R., 19 A., 462. The principle that there is no contribution between wrong doers laid down in the leading case of *Merryweather* v. *Nixan*, 1. Smiths L Cases 383, has been extended to cases where defendants have been made jointly liable for costs and one of them has paid them and sues the rest for their proportionate share. In the case under notice it was held that the principle applies where they have been made jointly liable for the costs, no matter whether they joined in the same defence or set up different defences and failed. Elsewhere we have commented upon its application to suits for contribution for costs, I. M. L. J. p. 2.

Moti Lal *v.* Makund Singh, I. L. R., 19 A., 477. We are unable to think this is a correct decision. The decree-holder as purchaser applies to be put in possession of the property purchased. He afterwards applies to execute the rest of the decree, and the question arises whether the prior application for possession can be treated as one to take a step in aid of execution. We think it cannot. It is difficult to see how the execution of the rest of the decree is aided by the application for possession. The moment the sale was effected and the purchase-money was set off towards the decree-amount, the proceedings in execution terminated; and any later proceeding for possession is a perfectly indifferent proceeding as regards the execution of the rest of the decree. The case of *Sujan Sing* v. *Hirah Sing*, I. L. R., 12 A., 399, is not altogether in support of the decision under notice, for in that case the application for the payment out of money was one calculated to effect a reduction of the decree-amount.

Sanwal Das v. Bismillah Begam, I. L. R., 19 A., 480. This case raises a question of some interest. A mortgage decree is sought to be

executed against the representative of the judgment debtor and a regular suit is afterwards brought by such representative to establish his right to the property on the ground that it was his own and not that of the judgment-debtor. Was this a question for settlement under S. 244 in execution, or could it be the subject of a separate suit ? As a mortgage-decree it directed the sale of the property and a representative of the judgment-debtor could not raise any objection to the execution of the decree where the judgment debtor himself could not. An objection, therefore, that the property was his own, could not well be taken by him. We think it is therefore rightly held that S. 244 does not bar a separate suit.

SUMMARY OF RECENT CASES.

Consent decree—Setting aside—Mistake.

Wilding v. Sanderson [1897, II. Ch. D. 534, C. A.]

A consent judgment or order is meant to be only the formal result and expression of an agreement already arrived at between the parties to proceedings embodied in an order of court, and as such can be properly set aside on any ground on which an agreement in the terms of the order could be set aside. This is the main proposition of law which the Court of Appeal had to declare in the case in hand. Upon the particular facts of the case their Lordships decided that the consent order was to be set aside having been vitiated by mistake. In so doing, their Lordships had to lay down the following propositions of law with respect to the recision of written contracts on the ground of mistake:—

1. A written contract cannot be impeached, simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed.

2. If the apparent and ordinary meaning of the contract does not express the actual agreement between the parties and the words were used by mutual mistake, then, the above principle is inapplicable, and the contract can be avoided by either party.

3. Again, a mistake by one of the parties as to the meaning of words used may be induced by the other party, and if so induced, the principle above stated ceases to be applicable.

4. Fourthly, a mistake as to the meaning of the words used may exist along with another mistake as to the subject-matter dealt with in

the contract; and if the parties are not *ad idem* as to the subject-matter about which they were negotiating, there is no real agreement between them, and the apparent contract is void.

In the circumstances of the case, the Court of Appeal (confirming the decision of *Byrne*, J.) held that the consent order in question was one liable to be set aside on any of the last three grounds stated above.

Construction of Statute.

London County Council v. Wood [1897, 2 Q. B. D. 482.]

The Highways and Locomotives Act, 1878 (42 and 41 Vic., Ch. 77), S. 32, runs as follows:—(a county authority may . . . make bye-laws for granting annual licenses to locomotives *used* within their county." Under this Statute the London County Council enacted the following bye-law:—"No locomotives shall be *used* on any highway within the county of London until an annual license for the use of the same shall have been obtained from the Council by the owner thereof.

The respondent (an Engineer) was charged before the Magistrate with having violated the above bye-law by running a locomotive through the streets of London without obtaining the license as above required. The locomotive was not used for the purpose of rolling the highway in London, but was in the course of a journey to the County of Kent, where it was intended to be utilized. On the above facts, *Collins*, J., held that the locomotive "was used within the County of London within the meaning of the section and the bye-law, although it was not employed in road-making."

On a construction of the bye-laws in question, the learned Judge had to come to the conclusion above mentioned, because the bye-laws provided for a mitigation of the charge for a license in the case of locomotives other than steam-rollers where such locomotives are in transit only. The inference, therefore, is irresistable that the word 'used' in the bye-laws included the process of transit. But the learned Judge proceeded further and decided that the word 'user' was intended to denote the same extended meaning in the section of the Statute also; says the learned Judge: "If I borrow a horse to draw a load 10 miles off, and in order to get to that place I ride the horse there, I clearly use the horse in so doing. I use it for a purpose ancillary to the principal purpose for which it was intended to be used." *Ridley*, J., concurred in this view. Certainly this is special pleading, and would have been justifiable in the address for the prosecution. The learned Judge has unfortunately used the word 'use' in as many different senses as it occurs in the above sentence.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications :—

The Principles of the Indian Contract Act by P. K. Nambiar, B.A., Bar.-at-Law, published by the Vaijayanti Press Madras:—Price Rs. 1-8-0. *The Hindu Law of Endowments*, by P. N. Saraswati, published by *Thacker Spink and Co., Calcutta.*

The Albany Law Journal for December (*in exchange*).
The Educational Review for December (*in exchange*).
The Calcutta Weekly Notes for December (*in exchange*).
The Allahabad Weekly Notes for December (*in exchange*).
The Green Bag for December (*in exchange*).
The Canada Law Journal for December (*in exchange*).
The Canadian Law Times for December (*in exchange*).

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Suppression of Touts:—We are glad to note that at a meeting of the members of the Tanjore Bar held on the 16th of December 1897, it was resolved that a list of touts should be submitted to the District Judge and that he should be requested to take the necessary action under the Legal Practitioners' Act. We are informed that the list comprises the names of thirty nine touts. The list is rather a short one for Tanjore, but a step has been taken in the right direction, and we hope, the members of the Bar will soon bring forward other names and do their best to put down a rampant evil in whatever quarters it may lurk The persons whose names have been submitted to the District Judge should be prevented from entering the precincts of the court-house, unless they happen to be litigants themselves, and a printed list of the names should be hung up conspicuously in front of each of the courts.

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The Criminal Procedure Amendment Bill:—There are one or two points more in connection with the Criminal Procedure to which we draw the attention of the member in charge of it. The Advocate-General may enter a *nulli prosequi* in the Presidency towns. There seems to be no such power possessed by any officer in the moffusil. It will be a useful provision to confer a power upon the Advocate-General to enter a *nulli prosequi* in the moffusil also. The difficulty felt oftentimes by Government, where in certain criminal cases they do not wish to prosecute, in saving the criminal from prosecution at the instance of a private person, would be removed if the Advocate-General had the power here referred to. In the case of the corrupt Mamaldars, the Bombay Government was powerless to save the persons who gave the

bribe. Provision may also be made requiring the sanction of Government before the prosecution of a person offering a bribe is instituted. S. 197 may have to be modified by including the offence of abetment of corruption also.

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Mr. Tilak's Appeal before the Privy Council:—It is much to be regretted that the Privy Council was not disposed to give leave. Some conservative organs in England appear to have taken objection to Mr. Asquith, an ex-cabinet minister appearing for Mr. Tilak. We think there is more point in the reply of some of the liberal organs that it was inexpedient that the Lord Chancellor, a member of the Government that instituted the prosecution should have sat on the Committee. If there was any criminal case that deserved to be judicially considered by the Privy Council, we think, it is the case of Mr. Tilak. The question involved was of great importance to the whole Indian Press. The case has excited the deepest public interest and the question involved is undoubtedly difficult. It is of course intelligible if the Privy Council absolutely declined to hear any criminal case. The practice of the Privy Council on this subject ought certainly to possess sufficient elasticity for eliciting an opinion from the Lords of the Judicial Committee upon this case. We cannot but think that the law laid down by Mr. Justice Strachey was wrong, and that both the Full Bench of the Bombay High Court and the Privy Council were wrong in refusing leave to appeal.

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A Correction:—Our attention has been drawn to a mistake in our notice of a case dealt with by Mr. Justice Benson on the Original Side. It appears that it is not correct that a copy of the plaint was not served on the defendant as stated by us, but it was merely an affidavit of service of the plaint that was wanting. We regret, we were misled by our informant as to what occurred before the learned Judge.

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To Become still better:—Jailer: Ha, here you are again! I thought your first punishment would have made you better.

Prisoner: So it did, but I wished to become still better.—*The Green Bag.*

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A Legal Laugh:—An Irish witness was being examined as to his knowledge of a shooting affair. "Did you see the shot fired?" the Magistrate asked. "No, sorr. I only heard it," was the evasive reply. "That evidence is not satisfactory" replied the Magistrate, sternly,

"Stand down!" The witness turned round to leave the box; and directly his back was turned he laughed derisively. The Magistrate, indignant at this contempt of court, called him back, and asked him how he dared to laugh in court. "Did ye see me laugh, your Honor?" queried the offender. "No, sir, but I heard you," was the irrate reply. "That evidence is saitsfactory," said Pat. And this time everybody laughed except the Magistrate.—*The Green Bag*.

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Mr. Justice Wright.—The Law Journal writes, "the appointment of Mr. Justice Wright to the place rendered vacant by Mr. Justice Williams, together with the transfer to him of the Railway and Canal Commission work, will result in the almost total removal of his lordship from the ordinary work of the Queen's Bench Division. Mr. Justice Wright is a lawyer of great ability and is otherwise considerably gifted; he would be a really good judge but for the habit into which he has fallen of arriving too quickly at what he believes to be the point in the case and the proper method of settling it, conclusions which he not infrequently changes later on in the course of the trial without warning to those who have relied on the earlier indications." The public of Madras will not have much difficulty in finding a parallel in our local High Court.

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Frauds on Powers of Appointment.

It was once said that the donee of a power of appointment could not make his political principles run with the land. And it has been considered that an appointment will be void *in toto* if the donee inseparably attach to the gift made thereby a condition which is not authorized by the power. Vice-Chancellor Hall once laid down the rule thus—that a power given to a parent to appoint amongst his children ought not to receive a limited or narrow construction, but ought rather to be construed so as to embrace any ordinary provision which a parent might make and which might be useful or available for the children amongst whom and in whose favour the power is to be exercised. According to 'Farwell on Powers,' this view is too widely expressed, 'and if adopted would dispose of many cases of frauds on powers.' Of course, if a condition is clearly against public policy or morality, no court will give effect to it. There is an Irish case in which an appointment was made in favour of a son if he should decide to reside in France, with a gift over in case he should not so decide. The appointment was held bad, on the ground that the intention of the donee was to induce the son to reside in France by giving him property which had belonged to another

person and over which the donee had only a power of appointment. On the other hand, Vice-Chancellor Hall decided in *Hodgson* v. *Halford*, 48 Law J. Rep. Chanc. 548, where a Jewess, who had a power of appointment among her children, annexed to the appointment a clause which forfeited the share of any child who married a Christian, that the forfeiture clause was not void as against public policy. This last case has been followed by Mr. Justice Byrne in *Wainwright* v. *Miller*, 66 Law J. Rep. Chanc. 616, where there was an appointment that a share of the property should be held in trust to pay the income to a daughter until she should become a member of a sisterhood, and it was held that the appointment was good, and that when the appointed entered a sisterhood, her interest terminated. In neither of these cases was there anything contained in the instrument which created the power as to making provision in an appointment for the case of the profession or adoption by the appointees, or the persons whom they married, of any particular religious views; the conditions in question were certainly not expressly authorized by the powers of appointment, although they are such as are frequently met with when testators are disposing of their own property.—*The Law Journal.*

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Mr. Justice Bigham:—MOST LAWYERS have a good word for the new judge of the Queen's Bench Division, and to all appearance Mr. BIGHAM deserves their favourable anticipations. He is a good all-round lawyer, specially versed in commercial law; possessed of clear and rapid judgment, yet careful and industrious in working up the details of cases, and remarkable among prosperous Queen's Counsel for his conscientious refusal to accept briefs which he had not time to master. Add to this that he is in the full vigour of life, and you have the elements likely to produce a Queen's Bench judge of the good old type—thoroughly efficient in the transaction of business and thoroughly trusted by the profession. In his early days Mr. BIGHAM was one of the reporters for the WEEKLY REPORTER:—*The Solicitors' Journal.*

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The Appointment to the Mastership of the Rolls is also unexceptionable. Lord Justice LINDLEY's high reputation as a lawyer needs no exposition; his kindly disposition has made him universally popular, just as his anxious, almost passionate, desire to do justice has made him universally esteemed. Nevertheless, if we may venture to say so with profound respect, this last admirable quality has been thought to have been sometimes rather carried to excess. The Division of the Court of Appeal over which the learned Lord Justice has presided has perhaps

occasionally been more ready to administer the law as it should be than the law as it is; and when a case, for instance, like *Broderip* v. *A. Salomon & Co.* (43 W. R. 612; 1895, 2 Ch. 323), has come before the court, they, in their haste to prevent injustice, have legislated, instead of administering the law, and have sometimes caused the greatest consternation and uncertainty in legal and commercial circles. In this matter (not of the desire to do justice, but the mode of doing it) there will be a remarkable contrast between the late and the present Master of the Rolls. Lord ESHER administered justice according to the logical results of the existing law; sentiment had no place in his composition, and if the law worked wrong, all he would do was to shrug his shoulders and regret his inability to alter the law. That, after all, appears to us to be the true function of a judge:—*The Solicitors' Journal.*

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Lord Esher, The Late Master of the Rolls:—LORD ESHER was a striking figure in the legal world: his retirement from the bench is an event. Whatever opinions may be held as to his position there, no one can deny that a gap is made in the Court of Appeal which no other man is likely to fill. He impressed himself upon his colleagues, as some thought, rather too much; he impressed himself upon the bar, as many thought, a great deal too much; he impressed himself upon the suitors and the public, and they were all delighted with it, especially the lady litigants. He was not only a considerable lawyer, but a more considerable man of the world. He played for effect, and won; and the straiter sect often thought it undignified, as the straiter sect generally think it improper to find salvation by any path but their own. But Lord ESHER could not without solid qualities have won and maintained for so long a period a triumph of popularity second to none; and very solid qualities he undoubtedly had. In an ingrained aptitude for logic he was not far behind Lord BRAMWELL; in native common sense he was a worthy disciple of Lord MANSFIELD; in caustic humour he might have run a fair race with Lord BLACKBURN. Now, logic, caustic humour, and common sense, when combined with an eye for effect not much inferior to Sir A. COCKBURN'S or Sir JOSHUA REYNOLDS'S go to make a considerable personality in any line, and especially in the law.

He began his judicial career by an effective *coup*, at which all the world wondered. Being Solicitor-General, he had the courage, on the defeat of his party, to take a puisne judgeship. Of course his enemies said that he was worth no more. But it was not long before the most learned of English judges of this century (Mr. Justice WILLES) paid

him the compliment of concurring in an elaborate judgment of his to which there was nothing to add. There can be little doubt that the explanation was that he really cared for judicial work, and would not be baulked from it by shallow considerations of professional dignity. This receives fresh force from the fact that he stuck to it for nearly double the period required to earn his pension, with a pertinacity which has made men wonder why he did not end more than they wondered why he began. And his belief in his qualifications has been fully justified by his steady advance to the Lord Justiceship, and by his ending his career, at the age of eighty-three, as President of the Court of Appeal and something of a popular idol.

But no one whose memory can go back for five-and-twenty years could doubt that from the first he was in his element as a judge, and enjoyed the work as openly and as artlessly as a young lady who can dance well will enjoy a ball, just as he brought to it an equal nicety and care in the matter of dress. One of the best tests of a judge in the old days was a Guildhall sitting at *Nisi Prius*, when the list was crowded with real commercial causes. Here Lord ESHER was at his best, his *forte* being in commercial law, and especially in shipping and insurance cases. Punctually he was in his place, and eagerly at work; and no sooner was he absorbed in the case than the correctness of his attire and manners were strangely marred by the oddest of tricks. He would sit with his elbows on his desk, making a succession of expressive grimaces and chewing the end of a quill pen, to be used as a weapon, now for warning a prevaricating witness, now for pointing a poser to counsel, and now for assistance in ogling the jury: effective in all, but mostly in the latter; for few juries were strong enough to withstand the homely and telling way in which he impressed upon them his view of the facts.* His knowledge of commercial law was his sheet anchor, both here and *in banco* and in the Court of Appeal; and it is to his special training in this that we owe the fact that, next to BOWEN, he was the common law judge who shewed least bigotry in favour of common law technicalities as opposed to equity. He was not above an occasional sneer at equity, but his common sense prevented his becoming a slave of his logic, as BRAMWELL to some extent was.

It is useless to try to select, in a career of nearly thirty years, any special reports of his judgments; it would, moreover, be misleading in his case, as it is not by particular displays of learning or rhetoric that he can be judged. His was a general influence of a sort, but not of any general principle other than that of common sense caustically applied to every individual case. It was not a consuming fire like JESSEL's nor

a still, small voice of far-seeing, conscientious principle like BOWEN'S. It was more like the influence of a good day with hounds—a breezy, invigorating process for which everyone is the better, but nobody knows why. It cannot be so lasting or so pronounced as that of either of the last-named judges; but, if we mistake not, Lord ESHER did not care for that. We have said earlier that he had something of the eye for effect which marked Sir JOSHUA REYNOLDS. Sir JOSHUA painted for the day in pigments which have mostly faded, but was the most popular painter of his day, and remains the type of a great school. Lord ESHER judged for the day, and became one of the most popular judges on the bench, and will also remain the type of a great school:—*The Solicitors' Journal.*

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Lord Esher's Farewell.

On Monday last the Lord Chief Justice's Court was crowded with members of the profession desirons of shewing respect to Lord Esher. There were present on the bench, in addition to Lord Esher, the Lord Chief Justice, the Master of the Rolls, Sir Francis Jeune, Lord Justice A. L. Smith, Lord Justice Rigby, Lord Justice Chitty, Lord Justice Collins, Lord Justice Vaughan Williams, Mr. Justice Mathew, Mr. Justice Barnes, Mr. Justice Kennedy, Mr. Justice Bigham, Mr. Justice Darling, Mr. Justice North, Mr. Justice Stirling, Mr. Justice Kekewich, Mr. Justice Romer, and Mr. Justice Byrne.

The ATTORNEY-GENERAL (the Bar standing), after referring to Lord Esher's career at the Bar, said: When, my lord, in 1868, you relinquished the high position of Solicitor-General to become one of the judges of the old Court of Common Pleas, there was not a few who thought that you had somewhat abruptly terminated what might have been a great Parliamentary or forensic career. But my lord, a few months were sufficient to satisfy all, that in undertaking the great responsibilities of a judge you were accepting the duties of an office which you were well qualified to fulfil. Many of us remember the great commercial years of prosperity and the Guildhall sittings unshorn of any of their ancient glory, and can remember the trial of many causes in which your lordship's business knowledge and acquaintance with commercial affairs came out in strong relief. Your translation to the Court of Appeal in 1876, and your selection as Master of the Rolls, following one of the quickest thinkers who has ever adorned the English Bench, are steps in your career which met with universal approval and approbation. I pause not to consider whether the twenty-nine years during which your lordship

has occupied high judicial position is without precedent, but this I say, without fear of criticism, that from the day when your lordship first sat upon the bench until the day of your retirement your career has been one of continuous and increasing success. Your lordship made your court a tribunal for business men in which mercantile usages and mercantile customs were grasped and appreciated and while you endeavoured to bring to bear to the case which you had to decide, all the legal knowledge at your disposal, you never permitted any legal technicalities to interfere with what you believed to be substantial justice. We at the Bar have winced at times under the searching criticisms of our arguments—criticisms which led us to stand up, as your lordship would have wished us to stand up, against the interlocutory comments, for the moment perhaps adverse to the views which we were expressing on behalf of our clients. But your lordship's comments left no sting behind, and on reflection we felt that your great object was first to ascertain the facts, and then to endeavour to see that justice should be done. I have but one more word to say. There is one feeling to which expression must be given, and that is the conviction which has rested in the hearts of every member of the Bar of your constant and unswerving loyalty to our profession. Though you were far above us, you still wished to be one of us; you respected our wants and our aspirations; you have shared our joys and our sorrows. It is this feeling which made it impossible that you should be allowed to retire in silence; it is this feeling which will link you with us in the future as it has in the past; it is this feeling which will make you carry with you a wealth of good wishes of far more value than any feeble words in which I have expressed them; it is this feeling which makes it so difficult for me to say the word which can scarcely be uttered by friends—I mean, farewell.

Lord ESHER, in reply, after a few jocular remarks, said: It is true that on the bench, when I was in the position of an officer on the quarter-deck, I had, and was obliged to give, occasionally, words of command; but the moment one leaves the deck one is nothing but a fellow-officer, and I have been nothing but a fellow-barrister with you always. It is in that character, therefore, that I desire to speak to you to-day. Now, next came to my mind what should be the tone which I should adopt. Shall it be the tone of sadness, as of a last dying speech and confession, or shall I say that which I feel—that I am as happy as a man can feel under the circumstances in which I now am? I have been a judge assisted by you all, by most of you who are here present, by almost all the profession, for twenty years and some months. I believe myself it

is the longest period ever known during which a judge has sat on the bench as a judge. I believe so; but I am not quite sure. I have ceased to be a judge, and the Queen has given me an unusual mark of approval, and that mark and your presence here to-day, and saying what you have said, have made me not only happy, but happy as a man can possibly be. You have mentioned the mode in which, or the circumstances under which, I became a judge. Well, all I will say to all of you is this—I became a judge because I had made up my mind and will from the beginning that I would be a judge. But do not suppose that I had no checks, and that there were not occasionally times when I thought that I was what people call passed over, which never really exists, as there is nothing to pass over, because we are all equals; but what I said to myself was, "Never mind, this is but a check, but I will go on and I will get the top if it is possible to do so." I recommend that to you all. I may say this as to my own method since I was a judge—I feel confident that never on any one single occasion at any period of my judicial career have I done anything except try, from the beginning of each case until it was ended, to get at the truth of the matter. I have never allowed my attention to be called to anything else in court. I have listened to witnesses; I have listened to arguments, and I have tried to test them and to consider them as they went on; and my great desire was, first of all, to come to a right determination as to what was the truth of the case in respect of which the parties were in dispute. I speak, of course, of civil actions. I have never been an enemy to the preliminary mode of investigation before the case comes into court. I have been a supporter of the means by which the parties can bring themselves to the real issue. I think that those means are sometimes, and not seldom, abused; that people will take objections and ask questions and insist on rights which are not wanted in the particular case. But, however that may be, when once the case has come into court, my desire and effort have been to get at what is the true state of things; and whether there has been a proper compliance with the preliminary steps at that moment has become entirely immaterial. I never could bring myself to think that a judicial tribunal ought to allow a person's rights to be overthrown because there had been some mistakes made in the preliminary steps or investigations by those who were his advisers. Well, having got, as I have tried to get, at the true facts of the case, I then had to consider what was the law. I am speaking, as I have said, of civil actions and disputes between parties. The duty of the judge is to find out what is the rule which people of candour and honour and fairness in the position of the two parties would apply in respect to the matter in hand. This is the com-

mon law of England, and there is no other law. It is only the common law, but if we go to equity it is the same thing. The law of England is not a science; it is a practical application of the rules of right and wrong to the particular case before the court. And the canon of law is that that rule should be adopted and applied to the case which people of honour and candour and fairness in such a transaction would apply each to the other. Now, if that be so, if any supposed rule of law is put forward which would prevent the rule of right being applied, the supposed rule of law must be wrong; and if it ever be alleged that the law will prevent the truth being established and oblige the court to say that that is not true which is true—if ever any such rule of law is attempted to be put forward it must be wrong, and I have always said so. Now, what the rules of right and wrong in the particular case are must be determined in each particular case; but nobody can have read the reports of decisions of great judges from the earliest times in England without trying to find in those reports the mode and manner in which those judges have stated the rule of conduct of the court, and that is what is called authority. But no decision—at least, in my opinion—of any judge as to the rule of law other than in an Act of Parliament can compel any court now to say that they were prevented from deciding that to be true which was in reality true; there is no such thing in the law as a rule which says that the court shall determine that to be true which the court believes and knows to be untrue. Now, those being the rules of conduct which I have laid down for myself, I have tried to carry those rules through. I have been assisted, as you must all know, by judges sitting with me, whose aid has been to me inestimable. I have been fortunate enough to retire, as I may say, with a mark, an unusual mark, given to me—a mark which I think has never been given to any judge for mere legal conduct since the time of Lord Coke. I have received that mark from the Queen, and that mark can leave nothing for me to wish. I now have received from you this kind greeting, and I have only one painful word, as the Attorney-General has said, to use from beginning to end, and that is to say to all of you, Good-bye.

Lord ESHER then bowed to the Bar, and, having shaken hands with some of the judges, retired.

REVIEWS.

The Principles of the Indian Contract Act, by P. K. Nambiar, B.A., Bar.-at-Law, published by *The Vaijayanti Press, Madras:*—Price Rs. 1-8-0. We cannot commend this book of Mr. Nambiar. We are unable to realize what good it is intended to serve. The first part of the book appears to be a summary of the principles of the law of contract as in force in British India. Where it is not a mere reproduction of the sections, it does not appear to contain anything useful or interesting. The book requires careful revision, for the typographical and other errors are numerous. It is neatly got up and does credit to the Vaijayanti Press.

The Specific Relief Act, by Mahendra Chandra Mitra, M.A., B.L., Second Edition, published by *Mukherjee & Co., Calcutta:*—Price Rs. 5. We have received the second edition of the Commentaries on the Specific Relief Act by Mr. Mahendra Chandra Mitra. The author appears to have taken great pains in collecting the English and Indian decisions upon the subject. Mr. Nelson's book is better arranged and the practising lawyer will find it an easier book of reference. A new edition of Collett's book has been issued by a Calcutta barrister; and we cannot think the editor has added much to the usefulness of that book. There are several knotty questions in the interpretation of the sections of this Act which have not been attacked by the author with any degree of success. Writing upon S. 56, the author does not explain the nature of the relief of injunction which is a direction in *personam.* The interpretation of the various clauses of that section depends upon a correct understanding of the true nature of the remedy of injunction which is not explained by the author. Though the book is dated 1897, there is no reference to *Venkatesa Tawker* v. *Ramasami Chettiar,* I.L.R., 18 M., 338, reported in 1895. Much learning is expended upon the construction of S. 9, but we have no clear presentation of the principles which underlie the idea of possession and the determination of possessory suits. But we feel no doubt that the book will be found useful by the profession as a repertory of valuable information.

The Hindu Law of Endowments, by P. N. Saraswati, published by *Thacker Spink & Co. Calcutta.*—This volume of Tagore lectures has unfortunately been delayed in publication by the lamented deaths of the author and of his brother. The book does not come up to the high level attained by the lectures of Mr. Justice Guru Doss Bannerjee on *Marriage and Stridanam*, and of Dr. Rash Behari Ghose on the *Law of Mortgages*. There is much antiquarian learning of no particular legal significance in the first four chapters and chapters 9 and 10. Indeed as a work upon a legal topic, it might have been cut down to much smaller dimensions, if what is contained in chapters 5, 6 and 7 had alone been given to the world. We are not disinclined to have this learning and research of the author placed within our reach though embodied in a treatise on a legal subject. We commend this book to students of the historical growth of the Hindu Law in an important department and to the members of the profession.

The Law of Consent, by Hukm Chand, M.A. published by *The Bombay Education Society Press, Bombay*:—Mr. Hukm Chand has succeeded in producing another interesting book which will be found very useful by the profession. This treatise on Consent gives a full account of the case-law on the subject up to date, supported by copious extracts from the works of all the text writers, European, Indian and American, who have had anything to say on the topic in one way or another. We must confess that we do not altogether approve of the author's arrangement of the various topics with which he deals, and his language is occasionally quaint and wanting in clearness; but this is perhaps due to the nature of the subject. On the other hand, the learned author has brought a vast amount of learning to bear on the subject, and the essays are full of interesting and useful information. He has seldom attempted to suggest any solution of his own with regard to the various questions of difficulty he has discussed; but so varied are the quotations which he has drawn upon, that the work is highly suggestive. On the whole, we have much pleasure in commending the book to the profession. We hope hereafter to deal at length with some of the subjects that Mr. Hukm Chand has dealt with.